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No. ....

IN THE

Supreme Court of the United States

October Term, 1981

GRACE BRETHREN CHURCH and REVEREND DAVID L. HOCKING, etc., *et al.*,

Appellees,

vs.

STATE OF CALIFORNIA, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, DIRECTOR OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

Appellants.

THE LUTHERAN CHURCH-MISSOURI SYNOD, a nonprofit membership corporation on behalf of 85 member Lutheran Churches, etc., *et al.*,

Appellees,

vs.

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, THE DIRECTOR OF THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

JURISDICTIONAL STATEMENT.

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Questions Presented.

Whether 26 U.S.C. § 3309(b)(1) and California Unemployment Insurance Code § 634.5(a) as interpreted and applied result in excessive entanglement of the state with religion in the benefit eligibility determination process with respect to employees of religious schools and thus are incompatible with the religion clauses of the first and fourteenth amendments.[1]

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[1]One jurisdictional statement is being filed due to the fact that the appeals are from the same court and involve identical or closely related questions. Rule 10.6. The actions below were in fact consolidated.

The plaintiffs in Case No. CV 79-93MRP (hereinafter referred to as the "Grace Brethren case") are:

Grace Brethren Church of Long Beach, California, and its pastor, Rev. David L. Hocking;

Calvary Cross Church of the Highlands of San Bruno, California, and its pastor, Rev. Donald B. Sheley;

Scott Memorial Baptist Church of San Diego, California, and its pastor, Rev. Tim LaHaye;

Christian Unified Schools of San Diego, an incorporated association of five fundamentalist schools with a central office in El Cajon, California;

Redwood Christian Schools, an incorporated association of four fundamentalist schools with a central office in Castro Valley, California;

Sidney and Patricia Bowen of Compton, California, whose children attend Grace Christian Schools, an affiliate of plaintiff Grace Brethren Church;

Peter and Sue Farrelly of Pacifica, California, whose children attend Highlands Academy, an affiliate of plaintiff Calvary Cross Church of the Highlands;

William and Janet Tschantz of LaMesa, California, whose children attend plaintiff Christian Unified Schools of San Diego;

Arthur and Cheryl Brandwood of Hayward, California, whose children attend plaintiff Redwood Christian Schools;

Stanley Eddington of San Lorenzo, California, a teacher at plaintiff Redwood Christian Schools;

R. Florence Murti of Daly City, California, a teacher at Highlands Academy; and

R. Suzanne Royer of Long Beach, California, a teacher at Grace Christian Schools.

(footnote continued on following page)

The defendants in the "Grace Brethren Case" — Case No. 79-93MRP are:

The State of California;

The California Employment Development Department;

The Director of the California Employment Development Department;

The United States of America;

The United States Department of Labor; and

The United States Secretary of Labor.

The plaintiffs in Case No. CV 79-162MRP (hereinafter referred to as the "Lutheran case") are:

The Lutheran Church-Missouri Synod, a nonprofit membership corporation on behalf of the eighty-five of its member churches which operate primary or secondary schools;

St. John's Lutheran Church, a member of plaintiff Lutheran Church-Missouri Synod and operator of a primary school in Orange, California; and

Vivadell Keiser, a teacher at the primary school operated by plaintiff St. John's Lutheran Church.

The named defendants in the "Lutheran case" — Case No. CV 79-162MRP are:

The California Employment Development Department;

The Director of the California Employment Development Department; and

The United States Secretary of Labor.

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STATE OF CALIFORNIA, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, DIRECTOR OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

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THE LUTHERAN CHURCH-MISSOURI SYNOD, a nonprofit membership corporation on behalf of 85 member Lutheran Churches, etc., *et al.*,

Appellees,

vs.

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, THE DIRECTOR OF THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

Appellants.

JURISDICTIONAL STATEMENT.

Appellants appeal from that portion of the final Judgments of the United States District Court for the Central District of California entered April 6, 1981, in both the "Grace Brethren" case and the "Lutheran" case, which holds that 26 U.S.C. § 3309(b)(1) and California Unemployment Insurance Code § 634.5(a) are unconstitutional as interpreted

and applied due to excessive entanglement between church and state in the benefit eligibility determination process with respect to employees of church related schools. Appellants submit this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW.

The Opinion of the United States District Court for the Central District of California for both cases is entitled Second Supplemental Opinion and is not presently reported. A copy of said Opinion is attached hereto as Appendix A. The Order and Judgment in the Grace Brethren case appears as Appendix B hereto. The Order and Judgment in the Lutheran case appears as Appendix C hereto. Copies of the District Court's two earlier Opinions entitled Opinion and Supplemental Opinion are likewise not presently reported and are attached hereto as Appendices D and E, respectively. Copies of the corresponding Orders appear as Appendices F and G, respectively.

JURISDICTION.

Both suits were brought in the District Court[2] on behalf of the respective church group appellees for injunctive and declaratory relief under the authority of 28 U.S.C. § 1331 as the suits involved substantial questions as to the interpretation and constitutionality of the Federal Unemployment Tax Act. ("FUTA"; 26 U.S.C. § 3301, *et. seq.*) Jurisdiction was further invoked in the Grace Brethren case under

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[2]The Lutheran case was originally brought in the Superior Court of the State of California for the County of Los Angeles and was subsequently removed by the federal defendants to the United States District Court for the Central District of California pursuant to 28 U.S.C. §§ 1441 and 1442. The Lutheran case was ultimately consolidated with the Grace Brethren case in that court.

42 U.S.C. § 1983, 28 U.S.C. §§ 1343, 1346, 2201 and 2202.

The judgments of the District Court were entered on April 6, 1981. See Appendices B and C. Appellants filed a Notice of Appeal to the Supreme Court of the United States from each judgment on May 6, 1981, with the Clerk, United States District Court for the Central District of California. See Appendices H and I.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1252, 2101(a). Such a direct appeal is allowed whether the Act of Congress was declared unconstitutional "as a whole" or simply "as applied." *United States v. Christian Echoes Ministry* (1972) 404 U.S. 561, 563. Herein, the District Court held 26 U.S.C. § 3309(b)(1) unconstitutional as interpreted and applied. Therefore, jurisdiction is properly invoked.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment, United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

26 U.S.C. § 3309:

"(a) State law requirements For purposes of section 3304(a)(6)-

(1) except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are —

(A) service excluded from the term "employment" solely by reason of paragraph (8) of section 3306(c), and

(B) service excluded from the term "employment" solely by reason of paragraph (7) of section 3306(c), and

(2) the State law shall provide that a governmental entity or any other organization (or group of organizations) which, but for the requirements of this paragraph, would be liable for contributions with respect to service to which paragraph (1) applies may elect, for such minimum period and at such time as may be provided by State law, to pay (in lieu of such contributions) into the State unemployment fund amounts equal to the amounts of compensation attributable under the State law to such service. The State law may provide safeguards to ensure that governmental entities or other organizations so electing will make the payments required under such elections.

(b) Section not to apply to certain service.

This section shall not apply to service performed —

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(2) by a duly ordained, commissioned, or licensed

minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a governmental entity referred to in paragraph (7) of section 3306(c), if such service is performed by an individual in the exercise of his duties —

(A) as an elected official;

(B) as a member of a legislative body, or a member of the judiciary, of a State of political subdivision thereof;

(C) as a member of the State National Guard or Air National Guard;

(D) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or

(E) in a position which, under or pursuant to the State law, is designated as (i) a major nontenured policymaking or advisory position, or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week;

(4) in a facility conducted for the purpose of carrying out a program of —

(A) rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or

(B) providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market, by an individual receiving such rehabilitation or remunerative work;

(5) as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any Federal agency or an agency of a State or political subdivision thereof, by an individual

receiving such work relief or work training; and

(6) by an inmate of a custodial or penal institution.

(c) Nonprofit organizations must employ 4 or more

This section shall not apply to service performed during any calendar year in the employ of any organization unless on each of some 20 days during such calendar year or the preceding calendar year, each day being in a different calendar week, the total number of individuals who were employed by such organization in employment (determined without regard to section 3306(c)(8) and by excluding service to which this section does not apply by reason of subsection (b)) for some portion of the day (whether or not at the same moment of time) was 4 or more."

California Unemployment Insurance Code § 634.5:

"Notwithstanding any other provision of this code or any other code or law, no provision of this code or any other code or law, no provision of this code or any other code or law excluding service from "employment" shall apply to any public entity defined by Section 605 or to any nonprofit organization described by Section 608, except as provided by this section. With respect to any public entity defined by Section 605 or any nonprofit organization described by Section 608, "employment" does not include service excluded under Sections 629, 631, 635, and 639 to 648, inclusive, or service performed in any of the following:

(a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

(b) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise

of duties required by such order.

(c) In the employ of any public entity defined by Section 605, if such service is performed by an individual in the exercise of his or her duties as any of the following:

(1) An elected official.

(2) A member of a legislative body, or a member of the judiciary, of a state or political subdivision thereof.

(3) A member of a State National Guard or Air National Guard.

(4) An employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency.

(5) In a position which, under or pursuant to state law, is designated as either of the following:

(A) A major nontenured policymaking or advisory position.

(B) A policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week.

(d) Except as provided by Section 605.5, by an individual receiving such rehabilitation or remunerative work in a facility conducted for the purpose of carrying out a program of either:

(1) Rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury; or

(2) Providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market.

(e) As part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual re-

ceiving such work relief or work training.

(f) Except as provided by Chapter 5.8 (commencing with Section 1480) of this part, by an inmate of a custodial or penal institution.

(g) By an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution.

(h) By an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him or her at a fixed price, his or her compensation being based on retention of the excess of such price over the amount at which the newspapers or magazines are charged to him or her whether or not he or she is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back.

(i) As a substitute employee whose employment does not increase the size of the employer's normal work force, whose employment is required by law, and whose employment as a substitute employee does not occur on more than 60 days during the base period, except that this subdivision shall not take effect unless and until the United States Secretary of Labor, or his or her designee, finds that this subdivision is in conformity with federal requirements.

This section shall become operative on July 1, 1978."

STATEMENT OF THE CASE.

The church group appellees in these two cases are religious organizations which operate private elementary and secondary schools. Both groups of church group appellees sought both declaratory and injunctive relief against appel-

lants herein as well as against the federal defendants. The dispute arose chiefly between the church group appellees and the federal defendants over whether services performed at schools operated by the church group appellees should be subject to unemployment taxation.[3]

The church group appellees contended and sought a declaration that such services were not subject to unemployment taxation on purely statutory grounds and in the alternative on the grounds that to impose unemployment insurance coverage upon them would be violative of their rights protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

Appellants agreed with the position of the church group appellees insofar as they sought declaratory relief on the purely statutory grounds and in fact cross-claimed against the federal defendants seeking comparable declaratory relief. However, appellants disagreed with the declaratory relief sought on any of the constitutional grounds.

The church group appellees also sought to enjoin the collection of unemployment information and tax, as well as disability information and tax by the appellants and to enjoin the federal defendants from taking any action to compel appellants to collect the unemployment insurance tax. The grounds were the same as those alleged in support of the request for declaratory relief.

Appellants opposed the issuance of injunctive relief on any grounds in that California law prohibits the enjoining of the collection of a tax. California Constitution, Article

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[3]It should be noted that disability taxes under California law were also involved in these actions since in California, covered services for unemployment insurance purposes are the same as covered services for disability insurance purposes. California Unemployment Insurance Code § 2606. The issue in this appeal is however limited to the unemployment insurance aspect of the case.

XIII, Section 32. Appellants' opposition to the issuance of any relief on constitutional grounds was raised in their Answer and Cross-Claim, their Memorandum of Points And Authorities In Opposition To The Federal Defendants' Motion to Dismiss, their Memorandum of Points and Authorities In Opposition To Motion For Preliminary Injunction, and their Supplemental Memorandum of Points And Authorities In Opposition to Motion For Preliminary Injunction. In opinions and orders filed on September 21, 1979, and June 2, 1980, (See Appendices D, E, F, and G) the District Court granted the federal defendants' Motion To Dismiss Cross-Claim, denied the federal defendants' Motion to Dismiss, and granted the motion for preliminary injunction against appellants for all but two of the church group appellees. At the preliminary injunction stage, although concluding that the Secretary of Labor's interpretation of 26 U.S.C. § 3309(b) imposed upon the States and embodied in Program Letter No. 39-78 (See Appendix J) was both erroneous as a matter of statutory construction and as inconsistent with the constitutional prohibition against excessive state entanglement with religion, the District Court did not pass on the precise question presented in this appeal.

The question raised in this appeal was first considered at length at the subsequent trial. The church group appellees presented no evidence to demonstrate that there ever had been a benefit eligibility determination hearing with respect to an employee of a church related school. The only evidence at the trial pertaining to the issue was hypothetical questions posed to two witnesses for the federal defendants and their responses thereto. Although each witness was experienced in the field of benefit eligibility determination hearings, both witnesses testified that they had never conducted, attended nor read a transcript of a benefit eligibility hearing where the issues involved a dispute between a

church and church employee with respect to the reasons for discharge of the employee by the Church.

Following the trial, the parties submitted post-trial briefs on the question presented herein as well as other issues. Appellants argued in opposition to the District Court's deciding the case on other than purely statutory grounds as well as its considering the evidence regarding the benefit eligibility determination process. The District Court concluded otherwise and held *inter alia* that excessive entanglement of church and state was inevitable during the benefit eligibility determination process if religious schools were brought within the scope of the unemployment tax scheme and therefore 26 U.S.C. § 3309(b) and California Unemployment Insurance Code § 634.5(a) were unconstitutional as interpreted and applied. (See Second Supplemental Opinion pages 25-33 (Appendix A); Grace Brethren Order (Appendix B); Lutheran Order (Appendix C).)

THE QUESTION IS SUBSTANTIAL.

I.

Introductory Statement.

In the Notice of Appeal to the Supreme Court of the United States, filed in the United States District Court, Central District of California, on May 6, 1981, appellants appealed from that part of the final judgments entered in the court below on April 6, 1981, holding that 26 U.S.C. Section 3309(b)(1) and California Unemployment Insurance Code Section 634.5(a) are unconstitutional as interpreted and applied. That portion of the final judgment from which appellants specifically appeal is much narrower than indicated in the Notice of Appeal. Appellants appeal only from that portion of the judgment which finds impermissible and excessive entanglement with religion in the benefit eligibility determination process with respect to employees of

religious schools. (Second Supplemental Opinion, pp. 25-33 (Appendix A).) This is an issue which was expressly not considered by this Honorable Court in its recent decision in *St. Martin Evangelical Lutheran Church, et al. v. South Dakota*, 49 U.S.L.W. 4575, 4579 (U.S., May 26, 1981). The issue is a substantial one affecting all unemployment insurance programs throughout the nation. Its resolution is absolutely necessary to the determination of this case due to the fact that two church group appellees (Christian Unified Schools of San Diego and Redwood Christian Schools) prevailed at the trial court level only because of the District Court's favorable holding on this issue. In order to more completely resolve the questions relating to unemployment insurance coverage of employees of church related schools, this Court should note probable jurisdiction, permit briefs and oral argument and resolve the question herein left unanswered by *St. Martin*.

II.

No Potential for Excessive Entanglement in the Benefit Eligibility Determination Process Has Been Shown.

Appellants' position in these consolidated cases has been unusual. Appellants have consistently agreed with the position of the church group appellees insofar as they sought declaratory relief on purely statutory construction grounds. The holding of the District Court on this issue is completely in accord with appellants' position.[4] In the court below, appellants strongly resisted the issuance of injunctive relief on any grounds due to California Constitutional provisions prohibiting the enjoining of the collection of a tax. Finally,

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[4]Likewise, appellants are in full agreement with this Court's holding in *St. Martin Evangelical Lutheran Church, et al. v. South Dakota*, 49 U.S.L.W. 575 (U.S., May 26,1981) and in fact filed an *amicus curiae* brief in support of such a holding.

appellants were opposed to any relief granted on constitutional grounds. In this appeal, appellants are focusing on that portion of the judgment which relates to the finding of excessive entanglement with religion in relation to the benefit eligibility determination process. As will be demonstrated below, the evidence produced at trial was far too speculative and does not support such a finding.

This Court has announced a three-part test for determining whether a statute is permissible under the Establishment Clause of the First Amendment of the United States Constitution. *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612-13. If a statute violates any of the three parts it must be struck down under the Establishment Clause. *Stone v. Graham* (1980) .... U.S. .... , 66 L. Ed. 2d 199, 202. The third part of the test is whether the statute fosters an "excessive government entanglement with religion." *Lemon v. Kurtzman, supra*, 403 U.S. 602, 613. This test is inescapably one of degree. *Walz v. Tax Commission* (1970) 397 U.S. 664, 674. Total separation between church and state is not possible nor is it required. Some relationship between government and religious organizations is inevitable. *Lemon v. Kurtzman, supra*, 403 U.S. 602, 614. The Religion Clauses must not be construed with a literalness that would undermine the ultimate constitutional objective as illuminated by history. *Walz v. Tax Commission, supra*, 397 U.S. 664, 671. Of course, the mere potential of *excessive* entanglement is sufficient to offend the First Amendment. *Meek v. Pittenger* (1975) 421 U.S. 349, 371-72; *Lemon v. Kurtzman* (1971) 403 U.S. 602, 615, 619-620; *Catholic Bishop v. NLRB* (7th Cir. 1977) 559 F.2d 1112, 1126, *aff'd.* 440 U.S. 490 (1979). However, the entanglement truly must be *excessive*. Appellants submit that any entanglement which might occur in the benefit eligibility determination process

would be, at most, *de minimis* and thus permissible under the Religion Clauses.

As was carefully and accurately pointed out by the District Court below, the unemployment compensation process involves two separate procedures: (1) a determination as to whether a certain employer is subject to unemployment insurance tax in the first instance (tax determination) and (2) a determination as to whether a specific employee is eligible for benefits (benefit determination).

The instant cases originated as a challenge to the imposition of the unemployment insurance tax upon church-schools, *not* as a challenge to an award of benefits to any church-school employee. Since these cases proceeded on the *tax* side of the unemployment compensation process, the record below consists exclusively of declarations, documentation and oral testimony which are related only to the *tax* determination procedure. There was no evidence presented by the church group appellees that there ever had been a benefit eligibility determination hearing with respect to an employee of a church related school, much less an actual hearing which necessitated inquiry into church doctrine. The only evidence at trial pertaining to this issue was in the form of hypothetical questions and answers posed to two witnesses for the federal defendants. That which is important though is that although each witness was experienced in the field of benefit eligibility determination hearings, both witnesses testified that they had *never* conducted, attended nor read a transcript of a benefit eligibility hearing where the issues involved a dispute between a church and church employee with respect to the reasons for the discharge of the employee by the church.

Such a speculative showing can hardly be deemed to demonstrate even a *potential* for excessive government entanglement.

Clearly, the church group appellees' objections to the benefit eligibility determination process are purely speculative. Unemployment coverage of employees of church-related schools is not a new phenomenon. Parochial elementary and secondary school employees universally were covered under the temporary Special Unemployment Assistant Program ("SUA"; P.L.93-567, 88 Stat. 1850) from 1974 through 1977, and have since been covered under FUTA in the states which adopted (prior to the *St. Martin* case) the Secretary of Labor's interpretation. Employees of church-related colleges have been covered since 1972.

Under California law, a determination under the tax side is not necessarily binding on any determination under the benefit side and vice versa. The leading case is *Empire Star Mines, Inc. v. California Employment Commission* (1946) 28 Cal.2d 33, where the California Supreme Court stated:

> "But there is no basis for the attorney general's contention that because the legislation confers benefits and also imposes taxes, the two parts of the law are inextricably connected. The taxing sections of the legislation are entirely separate from those concerning benefits, and although the benefits are paid from the amount collected as taxes imposed by the act, the provisions fixing liability for payments to the fund are to be considered accordingly." (*Empire Star Mines Co. v. Cal. Emp. Com., supra*, 28 Cal.2d 33, 43.)

The *Empire Star Mines* case dealt with the question of whether or not certain persons who performed services for the Empire Star Mines Company were employees or independent contractors. If these persons were employees, then Empire Star Mines would be subject to the unemployment insurance taxes of California, and its employees would be eligible for unemployment compensation benefits. The language quoted was the court's response to the state's argu-

ment that since the individuals who had performed services for Empire Star Mines had already been adjudged to be employees and were awarded unemployment compensation benefits by the California Employment Commission in an administrative proceeding dealing with the benefit issues that had become final, the California Supreme Court was precluded from a finding on the *tax issue* that would be contrary to that administrative result. In California, a determination by appellants with regard to benefit eligibility is separate and distinct from a determination by appellants with regard to whether or not an employer is subject to the unemployment insurance tax, and each determination may be challenged by the parties in separate proceedings. See California Unemployment Insurance Code §§ 1221 *et seq.* and 1326 *et seq.* It is clear that the California Supreme Court felt that the issue of liability for the unemployment insurance tax could and should be considered independent of any benefit determination involving the employees of the subject employer. Similarly, then, in arriving at a decision herein, this Court should follow California law and disregard the potential legal and/or constitutional questions raised by *benefit determinations* appellants might make with regard to employees of church-related schools.

In a benefit eligibility hearing, the purpose is to decide whether a particular employee will receive unemployment benefits. Appellants are not concerned with the religious beliefs of either the employer or employee. In determining whether an employee was discharged for misconduct the important factor is whether such employee failed to abide by an established work rule. Employers such as the church group appellees herein are of course free to establish any work rule they desire, including rules incorporating religious beliefs. A knowing violation of a work rule constitutes misconduct. The principle inquiry in a benefit eligibility

hearing is not whether a given work rule conforms to Church doctrine but only whether the employee knew of the rule and nevertheless violated it.[5] The benefit eligibility hearing could be conducted on a purely *secular* basis. As such the process clearly would not be violative of the First Amendment notwithstanding the religious nature of the employer. *United Methodist Council v. Superior Court* (1978) 439 U.S. 1369, 1371 (Rehnquist, J., in chambers).

This Court has decided a line of cases in recent years relating to church property disputes and the role civil courts may play therein. *Jones v. Wolf* (1979) 443 U.S. 595; *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696; *Maryland & Va. Churches v. Sharpsburg Church* (1970) 396 U.S. 367; *Presbyterian Church v. Hull Church*

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[5]The actual reasonableness of a given work rule is rarely the subject of inquiry. However, an employee is not required to comply with a work rule which is considered to be unreasonable in the following limited instances as set forth in Title 22 California Administrative Code Section 1256-36(b)(1):

1. The rule is unreasonable because compliance is impossible due to physical limitations of the employee.
2. The rule is unreasonable because compliance would impose a new and unreasonable burden on the employee.
3. The rule is unreasonable because it does not relate to or affect the employer's business interests.
4. The rule is unreasonable because the employee reasonably believes that compliance would result in a violation of law.
5. The rule is unreasonable because the employee reasonably believes compliance would cause an undue risk of injury or illness.
6. The rule is unreasonable because the employee had a reasonable doubt of the authority of the individual issuing the order.

The full text of Title 22 California Administrative Code Section 1256-36(b)(1) appears as Appendix K, hereto. The above regulation was promulgated by appellants pursuant to California Unemployment Insurance Code §§ 305 et seq. in order to enforce the provisions of Section 1256 of the California Unemployment Insurance Code.

It should be noted that the context in which an employee is not required to comply with a work rule under the above regulation is determined solely according to secular standards.

(1969) 393 U.S. 440. The principles developed therein are helpful and have been held to apply with equal force to church disputes over church polity and church administration. *Serbian Orthodox Diocese v. Milivojevich, supra,* 426 U.S. 696, 710.

From the above cases, it is well settled that the First Amendment prohibits civil courts from resolving church disputes on the basis of religious doctrine and practice. *Jones v. Wolf, supra,* 443 U.S. 595, 602; *Serbian Orthodox Diocese v. Milivojevich, supra,* 426 U.S. 696, 710; *Maryland & Va. Churches v. Sharpsburg Church, supra,* 396 U.S. 367, 368; *Presbyterian Church v. Hull Church, supra,* 393 U.S. 440, 449. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. *Jones v. Wolf, supra,* 443 U.S. 595, 602; *Serbian Orthodox Diocese v. Milivojevich, supra,* 426 U.S. 696, 724-5. The First Amendment however does not dictate that a state must follow a particular method of resolving church disputes. *Jones v. Wolf, supra,* 443 U.S. 595, 602. Indeed, a state may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters. *Maryland & Va. Churches v. Sharpsburg Church, supra,* 396 U.S. 367, 368 (Brennan, J., concurring). One of the approaches this Court has found to be constitutionally permissible is the neutral-principles approach. *Jones v. Wolf, supra,* 443 U.S. 595, 602-3; *Maryland & Va. Churches v. Sharpsburg Church, supra,* 396 U.S. 367, 368 (Brennan, J., concurring).

In the *Maryland & Va. Churches* case, the Court of Appeals of Maryland was permitted to settle a local church property dispute on the basis of the language of the deeds, the terms of the local church charters, the state statutes

governing the holding of church property and the provisions of the constitution of the general church concerning the ownership and control of church property. 396 U.S. at 368.

Also, in *Jones v. Wolf, supra*, 443 U.S. 595 this Court reaffirmed the neutral-principles analysis and further indicated that it was constitutionally permissible to require the interested parties to modify the deeds, charters or church constitution in order to ensure that a certain result would be reached by the civil courts adjudicating the dispute. The burden involved in taking such steps was held to be minimal. *Id.* at 606. Civil courts would be bound to give effect to the result indicated by the parties provided it is embodied in some legally cognizable form. *Ibid.*

Similarly, in a benefit eligibility hearing it would not be an unconstitutional burden to require the interested parties to prove what the work rule in question was. Under California law, the *employer* would have the burden of proving what the work rule was and that the employee knowingly violated it. *Maywood Glass Co. v. Stewart* (1959) 170 Cal.App.2d 719, 724-5; California Unemployment Insurance Code § 1256.

Once the church employer demonstrated what was the work rule or church doctrine alleged to have been violated, appellants would be bound to give effect to that work rule or church doctrine. *Jones v. Wolf, supra*, 443 U.S. 595, 606.

In determining whether there was a "knowing violation" of the work rule (or church doctrine as the case may be), appellants would *not* be foreclosed from determining the *existence* of the individual's religious belief or understanding of the church doctrine. Appellants would be foreclosed from determining the *truth* of that belief or understanding. *United States v. Seeger* (1968) 380 U.S. 163, 185. The

distinction between adjudicating the employee's *understanding* of church doctrine versus the doctrine itself is crucial. Only the former would need be adjudicated in a benefit eligibility hearing.

Furthermore, it has been held that the Religion Clauses do not prevent a civil court from independently examining and making the ultimate decision regarding the structure and actual operation of a hierarchical church and its constituent units. *United Methodist Council v. Superior Court, supra*, 439 U.S. 1369, 1372 (Rehnquist, J., in chambers). In *United Methodist,* Justice Rehnquist continued stating:

> "There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intra-church disputes. See *Serbian Eastern Orthodox Diocese v. Milivojevich*. But this Court never has suggested that those constraints similarly apply outside the context of such intra-organization disputes. Thus, *Serbian Eastern Orthodox Diocese* and other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intra-church disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. 426 U.S. at 709-710. *Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.*" *Id.* at 1372-3. (Emphasis added.)

The benefit eligibility hearing could conceivably be analogized to a breach of contract adjudication in that the employer is, in essence, alleging that the employee knowingly violated his or her "contract of employment." The proceeding would be purely *secular* with no necessity to

interpret or weigh church doctrine. *Cf. Presbyterian Church v. Hull Church, supra,* 393 U.S. 440, 450. The only issue to be resolved would be whether the employee failed to abide by an established work rule. The potential for any impermissible or excessive entanglement between church and state would be genuinely lacking.

Finally, this Court has recognized an exception to the rule that civil courts shall not disturb the decision of the highest ecclesiastical tribunal within a church of hierarchical polity in their application to the religious issues of doctrine or polity before them. *Jones v. Wolf, supra,* 443 U.S. 595, 609 fn.8; see also *United Methodist Council v. Superior Court, supra,* 439 U.S. 1369. If the decision of the religious tribunal was the product of fraud or collusion "marginal civil court review" of that decision would be permissible. *United Methodist Council v. Superior Court, supra,* 439 U.S. 1369; *Serbian Orthodox Diocese v. Milivojevich, supra,* 426 U.S. 696, 713. In fact, this Court has seemingly left open the question whether in addition to the above instances when a church tribunal "act(s) in bad faith for secular purposes", a limited exception may exist for an arbitrary decision by the church tribunal. See *Serbian Orthodox Diocese v. Milivojevich, supra,* 426 U.S. 696, 713.

Appellants are not suggesting that the decisions of church employers to terminate any employee are the products of fraud, collusion or arbitrariness. Nonetheless, that which is important is that this Court has permitted in those instances, a "marginal civil court review" of decisions of church tribunals on matters which are *purely ecclesiastical.* In a benefit eligibility hearing, however, there would *never* be a necessity to review the church employer's interpretation of its doctrine or work rules. Unquestionably, under the requisite close scrutiny of the *degree* of entanglement involved in the relationship, there would be absolutely no

potential for excessive governmental entanglement with religion. See *Lemon v. Kurtzman, supra,* 403 U.S. 602, 614. The judgment of the District Court in this regard must be reversed.

CONCLUSION.

The District Court's holding that there exists excessive governmental entanglement with religion in the benefit eligibility determination process is unsupported by the facts and law in this matter. Consequently, the judgment on this limited issue must be reversed.

For the above reasons, appellants respectfully request that this Court note probable jurisdiction of this appeal, and permit appellants to file their briefs on the merits and give oral argument in support of their position.

Respectfully submitted,

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APPENDIX A.

Second Supplemental Opinion.

United States District Court, Central District of California.

Grace Brethren Church and Reverend David L. Hocking, etc., et al., Plaintiffs, v. State of California, etc., et al., Defendants. Case No. CV 79-93 MRP.

The Lutheran Church-Missouri Synod, a non-profit membership corporation on behalf of 85 member Lutheran Churches, etc., et al., Plaintiffs, v. The State of California Employment Development Department, et al., Defendants. Case No. CV 79-162 MRP.

Filed: April 3, 1981.

In an Opinion of September 21, 1979 and a Supplemental Opinion of June 2, 1980, this Court concluded that the Secretary's[1] proposed interpretation of 26 U.S.C. 3309(b), imposed on the states by his directive,[2] was both erroneous as a matter of statutory construction and inconsistent with the constitutional prohibition against excessive state entanglement with religion. None of the subsequent developments in these two cases have altered that conclusion and the Court now reaffirms it. Accordingly, this Court's previous discussions of the language and legislative history of § 3309(b) and of the constitutionally impermissible entanglement which results from the application of the Secretary's "strictly church duties" test of exemption from unemployment tax coverge will not be repeated but, rather, are incorporated herein by reference.

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[1]The use of the abbreviations found in this Court's previous opinions will be continued in the course of this Opinion.

[2]The directive in question was Unemployment Insurance Program Letter No. 39-78 and was issued by Lawrence W. Rogers to all state employment security agencies on May 30, 1978. *See* this Court's Opinion of September 21, 1979, p.6.

There are, however, a number of residual constitutional and statutory issues either expressly reserved in this Court's prior opinions[3] or only developed fully since those opinions were issued. These additional issues, as developed in the briefs and declarations submitted by the parties[4] and the

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[3]*See, e.g.*, Supplemental Opinion (June 2, 1980),pp. 9-10.

[4]For convenience of reference, the parties in these two cases are set forth here.

GRACE BRETHREN, CV 79-93 MRP

The plaintiffs in this action are:

Grace Brethren Church of Long Beach, California, and its pastor, Rev. David L. Hocking;

Calvary Cross Church of the Highlands of San Bruno, California, and its pastor, Rev. Donald B. Sheley;

Scott Memorial Baptist Church of San Diego, California and its pastor, Rev. Tim LaHaye;

Christian Unified Schools of San Diego, an incorporated association of five fundamentalist schools with a central office in El Cajon, California;

Redwood Christian Schools, an incorporated association of four fundamentalist schools with a central office in Castro Valley, California;

Sidney and Patricia Bowen of Compton, California, whose children attend Grace Christian Schools, an affiliate of plaintiff Grace Brethren Church;

Peter and Sue Farrelly of Pacifica, California, whose children attend Highlands Academy, an affiliate of plaintiff Calvary Cross Church of the Highlands;

William and Janet Tschantz of La Mesa, California, whose children attend plaintiff Christian Unified Schools of San Diego;

Arthur and Cheryl Brandwood of Hayward, California, whose children attend plaintiff Redwood Christian Schools;

Stanley Eddington of San Lorenzo, California, a teacher at plaintiff Redwood Christian Schools;

R. Florence Murti of Daly City, California, a teacher at Highlands Academy; and

R. Suzanne Royer of Long Beach, California, a teacher at Grace Christian Schools.

The defendants in the case are:

The State of California;

The California Employment Development Department;

The Director of the California Employment Development Department;

(footnote continued on following page)

evidence presented at trial, will be addressed in this Second Supplemental Opinion, which shall constitute the Findings of Fact and Conclusions of Law in both cases.

I. STATUTORY CONSTRUCTION

In the prior opinions filed in this case, the Court concluded that the plain meaning of the language of § 3309(b)(1) operated to exempt both Category 1 employees (i.e., persons employed directly by a church or convention or association of churches), and Category 2 employees (i.e., persons in the employ of a separate corporation formed by a church or convention or association of churches) from unemployment compensation tax coverage.[5] It seemed equally clear to the Court that the same language excluded Category 3 employees (i.e., persons employed by incorporated religious

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The United States of America;

The United States Department of Labor; and

The United States Secretary of Labor.

LUTHERAN, CV 79-162 MRP

The plaintiffs in this action are:

The Lutheran Church-Missouri Synod, a non-profit membership corporation on behalf of the eighty-five of its member churches which operate primary or secondary schools;

St. John's Lutheran Church, a member of plaintiff Lutheran Church-Missouri Synod and operator of a primary school in Orange, California; and

Vivadell Keiser, a teacher at the primary school operated by plaintiff St. John's Lutheran Church.

The named defendants in this action are:

The California Employment Development Department;

The Director of the California Employment Development Department; and

The United States Secretary of Labor.

[5]The Court's construction of the parallel language in the California counterpart to § 3309(b)(1), Cal. Unempl. Ins. Code § 634.5(a), was, of course, identical. Moreover, because Cal. Unempl. Ins. Code § 2606(a) defines covered employment for purposes of the state disability tax in the same way it is defined for purposes of the unemployment compensation tax, the Court's conclusions concerning the force of the statutory exemption apply to the disability tax as well.

schools not affiliated with a church or convention or association of churches) from the class of exempt employees. The non-church-affiliated fundamentalist schools in the Grace Brethren case (and their Category 3 employees) now challenge the conclusion that they are not exempt under the plain meaning of the statute. Specifically, the administrators and teachers of the non-church-affiliated schools contend that their schools are included in the term "church" as it appears in the exemption provisions of § 3309(b)(1).[6] Therefore, they argue, the Category 3 employees of such schools have as clear a *statutory* entitlement to exemption as the Category 1 and Category 2 employees whose tax-exempt status the Court has already recognized.

The evidence plaintiffs have submitted to support the claim that an independent fundamentalist school is a "church" in the relevant sense is extremely weak. In the testimony of an administrator of Redwood Christian Schools, the term "church" was equated (apparently on the basis of Scripture) with a "body of believers" in general, and the same witness testified to his belief that those associated with his institution constituted such a body. An expert witness testified that certain etymological ancestors of the word "church" from the Old and New Testament eras included the concepts of "school" and "library" as well as that of a house of worship. One need not doubt the sincerity of plaintiffs' witnesses, however, to conclude that such testimony is of little probative value. The scope of the tax exemption accorded to employees of a "church" or a "convention or association of churches" depends, not on the meaning of "church" with the best claim to foundation in

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[6]The evidence at trial and the argument in the Grace Brethren plaintiffs' brief were specifically directed to demonstrating that plaintiff Redwood Christian Schools is a "church".

the Bible or the meaning ascribed by Greeks or Hebrews of remote antiquity to expressions from which the word "church" descended, but on the meaning of "church" in ordinary contemporary English and, in particular, its meaning to those who enacted § 3309(b)(1).

Unfortunately, the word "church" has a range of accepted definitions, varying in breadth from the narrow designation of a particular building used as a place of public worship to a comprehensive reference to the total body of Christians regarded as a spiritual society.[7] No definition of "church" appears either in the Internal Revenue Code or the California Unemployment Insurance Code. Thus, what Congress intended by the use of the term "church" in § 3309(b)(1) must be derived from an analysis of the language of the section itself and of similar language occurring in other sections of the Internal Revenue Code.

Initially, it should be noted that the *structure* of § 3309(b)(1) precludes the generic definitions of "church" offered by plaintiffs, i.e., those definitions which identify the "church" with the entire body of Christian believers or with any identifiable subclass of Christian believers. Section 3309(b)(1)(A) exempts from tax those in the employ of a "church" or a "convention or association of churches." Clearly, if the term "church" had been intended to refer to the *entire* body of believers, it would have made little sense to speak, in the same subsection, of a "convention or association of churches." Similarly, § 3309(b)(1)(B) seems to presuppose a distinction between an "organization which is operated primarily for religious purposes" and the "church or convention or association of churches" which must operate,

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[7]For a list of the definitions of the term "church", see *Webster's Third New International Dictionary* (Unabridged), G.C. Merriam & Co., Springfield, MA, (1976) p. 404.

control, supervise, or support it if its employees are to be tax-exempt. The clear implication is that some religious organizations must fail to qualify as "churches". If no such distinction is maintained, a portion of the language of § 3309(b)(1)(B) is rendered meaningless and redundant.

Moreover, the fact that in both §§ 3309(b)(1)(A) and (B) the word "church" occurs in conjunction with the phrase "or convention or association of churches" at least suggests that Congress, in using those expressions, envisioned a narrower concept of "church" than that urged by plaintiffs. In particular, the phrase "convention or association of churches" is obviously suggestive of certain of the familiar Protestant denominations (e.g., the Baptists) which exhibit a "congregational" ecclesiastical structure.[8] "Congregational" denominations are essentially consensual alliances of autonomous local congregations. While such groups of congregations may unite voluntarily to carry out certain activities (e.g., missionary work or the maintenance of a seminary), the individual local congregations are not bound by ecclesiastical law to follow a centralized church authority.[9] The phrase "convention or association of churches" is a singularly apt way of describing such a denomination. The same phrase is, strictly speaking, less accurate as a description of a "hierarchial" denomination (e.g., the Roman Catholic, Eastern Orthodox, Presbyterian, and Mormon denominations), since the local congregations of such denominations are religiously subservient to a central church authority and thus are more like subdivisions of a single

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[8]The distinction between denominations having a "congregational" structure and those having a "hierarchical" structure is explained in Whelan, C.M. "*Church" in the Internal Revenue Code*, 45 FORDHAM L. REV. 885, 903-4 (1977) (hereafter cited as "Whelan"). The author is careful to note that the distinction is one of *ecclesiastical* structure, not of civil law corporate structure. *Id.*, at 904-5.

[9]*Id.*, at 904.

religious entity than autonomous units.[10] While it would, therefore, be better to use the singular term "church" to refer to such a denomination, it is not unnatural to refer to it as a "convention or association of churches" if one focuses on the local congregations. In any case, the major point is that the phrase "convention or association of churches", which occurs in conjunction with "church" in § 3309(b)(1), carries certain connotations of formality and institutionalization. It suggests that when Congress used the phrase "church or convention or association of churches" in § 3309(b)(1), it was referring to the established, institutionalized religious denominations[11] and their constituent congregations.

This impression drawn from the language of § 3309(b)(1) is confirmed when the legislative history of some of the other Internal Revenue Code sections containing the phrase "church or convention or association of churches", and the few reported cases in which that phrase has been construed, are examined.[12] Indeed, the only potential support for plaintiffs' broad reading of "church" is an isolated sentence in a Senate report accompanying § 170(b)(1)(A) of the Internal Revenue Code of 1954, which specified the limits on the deductibility of charitable contributions. As originally en-

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[10]Thus, Whelan notes, it is proper to use the term "Roman Catholic Church" to refer to *all* Catholic congregations, while it is, strictly speaking, a mistake to speak of "the Baptist Church" instead of "Baptist churches" in referring to *all* Baptist congregations. *Id.*, at 903-4.

[11]While the Court's discussion so far has referred primarily to Christian denominations and congregations because the plaintiffs are Christians and Christian institutions, the Court does not imply that the exemption of § 3309(b)(1) is so limited.

[12]A complete list of the Internal Revenue Code sections in which "church or convention or association of churches" has been used can be found in Whelan, *supra*, p. 888 n. 14.

acted,[13] § 170(b)(1)(A)(i) permitted a deduction for charitable contributions to a "church or convention or association of churches" of up to 30% of a taxpayer's adjusted gross income. Contributions to other charitable organizations, including other *religious* organizations, were deductible only up to 20% of adjusted gross income.[14] However, in the original House version of § 170(b)(1)(A)(i), the phrase "or a religious order" was appended to the phrase "church or convention or association of churches". The Senate Finance Committee deleted the reference to religious orders with the following explanation:

> Your committee understands that "church" to some denominations includes religious orders as well as other organizations which, as integral parts of the church are engaged in carrying out the functions of the church whether as separate corporations or otherwise. *It is believed that the term "church" should be all inclusive*. To retain the phrase "or a religious order" in this section of the bill will tend to limit the term and may lead to confusion in the interpretation of other provisions of the bill relating to a church, a convention or association of churches. Accordingly, your committee believes that the section of the bill will be clarified by this amendment.[15] [Emphasis added]

Ultimately, the Senate version was adopted by both Houses of Congress.[16] the "all inclusive" language of the Senate Report is the only scrap of legislative history which

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[13]Section 170 has been amended a number of times, and the successor to the provision discussed in the text is now codified at 26 U.S.C. § 170(b)(1)(A)(i).

[14]*See* Whelan, *supra* at 907-909, for an account of the provisions and history of the original § 170(b)(1)(A).

[15]S. Rep. No. 1622, 83d Cong. 2d Sess. 30 (1954), quoted in Whelan, *supra*, at 908.

[16]*See* Whelan, *supra*, at 909.

even arguably supports a reading of "church" broad enough to encompass independent fundamentalist schools like those involved in the Grace Brethren case. However, such a broad reading of "church" was expressly rejected as a construction of § 170(b)(1)(A)(i) by the Tax Court of the United States in *Vaughn v. Chapman*, 48 T.C. 358 (1967). In that case, the Court refused to permit a taxpayer to take advantage of the higher limit on deductions for contributions made to a "church or convention or association of churches" with respect to a contribution made to Missionary Dentist, Inc., an interdenominational Christian missionary organization. The Court specifically rejected the thesis that the "all-inclusive" language of the above-quoted Senate report made the term "church" synonymous with "religious organizations in general. In part, this rejection was based on the legislative history of the tax on unrelated business income of tax-exempt organizations imposed (as an amendment to the Internal Revenue Code of 1939) by the Revenue Act of 1950, in which the phrase "church or a convention or association of churches" was used for the first time. A Senate Report accompanying that Act had drawn a strict distinction between churches and conventions or associations of churches, which were not subject to the unrelated business income tax, and admittedly *religious* organizations "organized under church auspices", which were subject to the tax. *Vaughn v. Chapman*, 48 T.C. at 362. The Court concluded that the imposition of differential limits on the deductibility of contributions of "churches or conventions of churches" and contributions to other religious organizations similarly implied a restrictive reading of "church" which excluded some religious organizations from its scope in spite of the "all-inclusive" language quoted above. (*Id.*, at 363).

Furthermore, the Tax Court concluded that the most probable meaning of "church", both as used in § 170(b)(1)(A)

and in the quoted language of the Senate Report (which included references to "integral parts of the church" and "functions of the church") was the sense in which "church" is synonymous with "*denomination*" or "*sect*". (*Id.*, at 363.) In spite of the fact that the Tax Court fully accepted both the contention that Missionary Dentist, Inc., was a genuinely religious organization operated primarily for evangelical purposes and the claim that its members preached and conducted religious services, it refused to accord the organization that status of a "church". The major reason for the denial of church status was the fact that the organization was a nondenominational one, committed to the advancement of general Christian principles rather than *sectarian* dogma and drawing its membership from various recognized denominations. (*Id.*, at 364.) Although *Vaughn v. Chapman, supra*, was decided under I.R.C. § 170(b)(1)(A)(i), the identity of the statutory language used in that provision and § 3309(b)(1), as well as the factual similarities[17] between the religious organizations involved in *Vaughn v. Chapman*, and the independent fundamentalist schools claiming to be "churches" in the instant case, makes the reasoning of the Tax Court in *Vaughn v. Chapman* persuasive.

Further illumination concerning the meaning of "church" is provided by a brief examination of § 511 of the Internal

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[17]The independent fundamentalist schools are, like the organization considered in *Vaughn v. Chapman*, nondenominational. Though the schools were formed and are operated predominantly for evangelical purposes, and though chapel services are conducted in the schools, the teachers and administrators of the schools are neither ordained ministers nor committed to any particular Christian denomination as a matter of school policy. Indeed, at trial, an administrator of plaintiff Redwood Christian Schools testified that formal denominational affiliation was *avoided* in order to broaden the appeal of the schools to parents and students of different denominations.

Revenue Code of 1954,[18] which governs the tax on unrelated business income of tax-exempt organizations. As originally enacted, § 511(a)(2) exempted, *inter alia*, "a church, a convention or association of churches, . . ." from the tax imposed by § 511(a)(1). While this exemption was ultimately repealed by the Tax Reform Act of 1969,[19] a regulation promulgated by the Treasury Department while the exemption was in effect contains the only extended administrative interpretation of the word "church" of which the Court is aware. The regulation, found at 26 C.F.R. § 1.511-2(a)(3), provides, in pertinent part:

> (3)(i) For taxable years beginning before January 1, 1970, churches and associations or conventions of churches are exempt from the taxes imposed by section 511. The exemption is applicable only to an organization which itself is a church or an association or convention of churches. Subject to the provisions of subdivision (ii) of this subparagraph, religious organizations, including religious orders, if not themselves churches or associations or conventions of churches, and all other organizations which are organized or operated under church auspices, are subject to the tax imposed by section 511, whether or not they engage in religious, educational, or charitable activities approved by a church.
>
> (ii) The term "church" includes a religious order or a religious organization if such order or organization (a) is an integral part of a church, and (b) is engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise. In determining whether a religious order or organization is an integral part of a church, consideration will be given to the

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[18]26 U.S.C. § 511.
[19]Pub. L. No. 91-172.

> degree to which it is connected with, and controlled by, such church. A religious order or organization shall be considered to be engaged in carrying out the functions of a church if its duties include the ministration of sacerdotal functions and the conduct of religious worship. If a religious order or organization is not an integral part of a church, or if such an order or organization is not authorized to carry out the functions of a church (ministration of sacerdotal functions and conduct of religious worship) then it is subject to the tax imposed by section 511 whether or not it engages in religious, educational, or charitable activities approved by a church.

The foregoing regulatory language is not a model of clarity. However, at least two aspects of it support the thesis that non-denominational, fundamentalist schools would not qualify as "churches". First, in subdivision (i), a strict distinction is drawn between churches and conventions or associations of churches, on the one hand, and other religious organizations organized or operated "under church auspices" on the other, even where the latter type of organizations perform religious, *educational* or charitable activities of which a "church" approves. The reference to the educational activities of religious organizations excluded from the meaning of "church" would seem to preclude classification of the independent fundamentalist schools as "churches". Second, although subdivision (ii) does define a limited range of circumstances in which religious orders or other religious organizations may be treated as "churches", its requirement that such an organization engage in "the ministration of sacerdotal functions" certainly seems to restrict the term "church" to organizations having a formally ordained priesthood or clergy. Since formal ordination of clergy is a characteristic of the established religious denominations, it is difficult to see how a nondenominational ed-

ucational institution, independent of clerical control, could qualify as a "church".[20]

The conclusion drawn from the language of the foregoing regulation is confirmed in the only reported federal district court case in which the "church" and "convention or association of churches" language of § 511 has been discussed in detail, *De La Salle Institute v. United States*, 195 F. Supp. 891 (N.D. Cal. 1961). In that case, a non-profit corporation composed of members of the Christian Brothers Order (a group of non-ordained monks) sued for a refund of taxes paid on unrelated business income under § 511 and its predecessor. The corporation operated a novitiate, homes for members of the Order, a winery and distillery, and Catholic *elementary and secondary schools*. Relying, in part, on the regulation quoted above and similar language in the legislative history and regulations relating to the predecessor of § 511, the court held that the Christian Brothers Order, the plaintiff corporation controlled by the Order, and all of the institutions operated by the corporation (including the parochial schools) failed to qualify as "churches" within the meaning of the exemption provisions of § 511. Once again, the parallel implications for the classification of independent fundamentalist schools under the virtually identical language of § 3309(b)(1) and its state counterparts are obvious.

Finally, commentators have observed that the Internal Revenue Service has, over a period of twenty years, developed a working set of criteria for determining, for a variety of tax purposes, whether a particular institution is a "church". These criteria include:

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[20]An administrator of Redwood Christian Schools testified that neither he nor the teachers at his school were ordained ministers.

> (1) a distinct legal existence, (2) a recognized creed and form of worship, (3) a definite and distinct ecclesiastical government, (4) a formal code of doctrine and discipline, (5) a distinct religious history, (6) a membership not associated with any church or denomination, (7) a complete organization of ordained ministers ministering to their congregations and selected after completing prescribed courses of study, (8) a literature of its own, (9) established places of worship, (10) regular congregations, (11) regular religious services, (12) Sunday schools for the religious instruction of the young, and (13) schools for the preparation of its ministers.[21]

As one critic observed, "In effect, the criteria require a religious organization to be a highly developed denomination before it can qualify as a church."[22] While this identification of the meaning of "church" with the established institutionalized religious denominations and their constituent congregations has been criticized,[23] the fact remains that what legislative, regulatory, administrative, and judicial authority exists supports such a view as a matter of statutory construction.[24] Therefore, it is the opinion of this Court that the nondenominational, fundamentalist elementary and secondary schools in the Grace Brethren case cannot be classified as "churches" within the meaning of 26 U.S.C. § 3309(b)(1) and Cal. Unempl. Ins. Code § 634.5(a). As a result, the employees of such schools do not fall within

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[21]B. Hopkins & J. Myers, The Law of Tax-Exempt Organizations 87 (1975), reprinted in Whelan, *supra*, at 925, n.164.

[22]Whelan, *supra*, at 925.

[23]See, especially, Whelan, *supra*, at 925-928.

[24]Whether the assignment of tax exemptions to "churches" defined in this denominational fashion and the withholding of exemptions from similar, but nondenominational, religious organizations is constitutional is a separate question and will be discussed at II. D., below.

the statutory exemption from the unemployment compensation tax.

II. THE CONSTITUTIONAL ISSUES

A. Questions Presented

As stated, an analysis of the plain meaning of the provisions of 26 U.S.C. § 3309(b)(1)(A) and (B) (and the parallel provisions of Cal. Unempl. Ins. Code § 634.5(a)(1) and (2)) compels the conclusion that the church-affiliated school employees in Categories 1 and 2 are exempted from unemployment compensation tax coverage, while the Category 3 employees of religious, but non-church-affiliated or nondenomination schools are covered. Moreover, because, under the Court's interpretation, the identity of the employer, rather than the nature of the services performed, is the decisive factor in determining whether or not a particular employee is covered by the unemployment compensation tax, excessive monitoring or surveillance of the daily activities of employees of church-affiliated schools should not be necessary to the administration of the unemployment insurance scheme. Since it is not necessary (as it was under the Secretary's interpretation of the relevant statutes) to determine whether an employee spends over 50% of his or her time performing "strictly church duties," the constitutionally impermissible entanglement of the state with religion which such exemption determinations would presuppose is avoided.

However, plaintiffs have raised three additional constitutional issues which must be addressed. First, plaintiffs contend that the imposition of the unemployment compensation tax upon religious elementary and secondary schools violates the Free Exercise Clause of the First Amendment. Second, plaintiffs contend that, even if the Secretary's inter-

pretation of the relevant statutes is rejected, the *benefit eligibility* determinations which remain necessary in the cases of individual school employees who are discharged for misconduct or who leave work without good cause pose a threat of constitutionally proscribed state entanglement with religion as great as the complicated *exemption* determinations which would have been necessary under the Secretary's view.[25] Finally, the plaintiffs in the Grace Brethren case argue that if, as this Court's "plain meaning" analysis dictates, 26 U.S.C. § 3309(b)(1)(A) and (B) (and the mirror-image provisions of the California Unemployment Insurance Code) must be construed to exempt the church-affiliated school employees of Categories 1 and 2 from the unemployment compensation tax but to cover the non-church-affiliated religious school employees of Category 3, then the statutes arbitrarily discriminate in favor of the employees of the church-affiliated schools in violation of the Equal Protection Clause.

B. The Free Exercise Clause

Initially, plaintiffs argue that, in order to survive a challenge based upon the Free Exercise Clause, a statute must pass one of two tests. Specifically, it must be shown *either:*

a. That the statute does not significantly abridge interests protected by the First Amendment; or

b. That whatever burden the statute imposes on religious activity or belief is justified by a compelling state interest within the state's regulatory power.

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[25]Since the Secretary's interpretation of § 3309(b)(1) would have subjected employees of all of the schools in both cases to the unemployment compensation tax, all of the plaintiffs have raised the first two constitutional issues.

Sherbert v. Verner, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

It is obvious that the plaintiffs in this case are asserting legitimate First Amendment interests. The United States Supreme Court has recognized that the operation of parochial schools may be an "integral part" of the religious mission of a particular church. *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). Indeed, the evidence before this Court compels the conclusion that the dominant purpose of all of the schools which either are, or are represented by, plaintiffs in these cases is the propagation of the Christian faith. In this respect, the schools in this case are no different from the Catholic parochial schools found to be predominantly religious in purpose and atmosphere in *Lemon v. Kurtzman, supra* and *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979).

Similarly, there can be no doubt that the plaintiff parents and religious schools teachers are asserting interests protected by the First Amendment. The right of parents to choose a religious education for their children was affirmed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In that case, the United States Supreme Court invalidated a compulsory school attendance statute for interference with the rights of parents and children to practice the Amish faith, which required that any training the children received beyond a certain age take place in the Amish community, where secular influence could be minimized. Finally, although this Court remains unconvinced by the contention of certain of the plaintiff teachers that they are "ministers," either as that term is normally understood or as it is used in the exemption provision in § 3309(b)(2), the Court sees no reason to doubt the sincerity of their respective assertions that the choice of teaching in a religious school as a vocation is both a product of and an expression of religious faith.

There is evidence in the record that the plaintiff teachers attempt to teach all subjects from a religious point of view, and, while it is unlikely that the content of certain courses (*e.g.*, driver's education) taught in religious schools differs from the content of the same courses as taught in secular schools, the opportunity for the injection of religious doctrine into other courses (*e.g.*, world history) is obvious. Indeed in a somewhat different context, the United States Supreme Court has expressed some doubt that lay teachers in parochial schools could avoid engaging in religious indoctrination while teaching purportedly "secular" subjects even if they desired to do so. In *Lemon v. Kurtzman, supra,* the Court, in the course of determining whether government salary supplements to lay teachers who taught secular subjects in parochial schools would violate the Establishment Clause, stated:

> We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine.

Lemon v. Kurtzman, supra, 403 U.S. at 618-9.

In this case, the plaintiff teachers and schools neither desire nor pretend to be "religiously neutral" or to separate secular and religious teaching. Rather, their avowed goal is to provide an education so saturated with religious doctrine and values as to ensure the transmission of their faith to succeeding generations.

Thus, the interests which plaintiffs assert are clearly within the scope of First Amendment protection. However, it is the opinion of the Court that the application of the

unemployment compensation tax scheme to the employees of religious schools is not a sufficient burden on those interests to amount to a violation of the Free Exercise Clause. It is undeniable that the imposition of the tax on religious school employees will make the operation of the schools somewhat more expensive. However, aside from the fact that the record as a whole does not support the conclusion that the effect of the additional financial burden will be significantly harmful, the mere fact that a statute renders the practice of religion somewhat more expensive is not, by itself, sufficient to bring the statute into conflict with the Free Exercise Clause. *Braunfeld v. Brown*, 366 U.S. 599 (1961).[26]

Plaintiffs, of course, insist that subjecting religious school employees to the tax will result in evils beyond the obvious cost increases in the operation of religious schools. Chiefly, plaintiffs argue that the prospect of being required to make increased tax contributions following the termination of employees will prevent religious schools from terminating teachers for religious reasons. For example, the principal of a religious school might desire to discharge a teacher for ineffectiveness in communicating the religious doctrine officially espoused by the institution, for failure to adhere to all points of doctrine in teaching, for lack of "religious fervor," or simply because a replacement whose religious credentials (*e.g.*, training at a religious college) are superior is available. The principal's ability to carry out his desire,

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[26]In *Braunfeld v. Brown, supra*, the United States Supreme Court sustained a state's mandatory Sunday closing law against a Free Exercise Clause challenge brought by Orthodox Jewish merchants. The Court accepted the merchants' contention that the law imposed a financial burden upon the exercise of their religion, but found that burden insufficient to render the law constitutionally invalid in light of the state's compelling interest in a uniform day of rest and the indirect nature of the financial burden itself.

plaintiffs argue, would be hampered by the possibility that the terminated employee would be found to be entitled to unemployment benefits and that the school's tax contribution would increase as a result. Ultimately, plaintiffs argue, the chilling effect of this on the exercise of the power to discharge employees could result in the loss of the doctrinal purity and uniformity which is so essential in religious schools.

The evidence before the Court that the foregoing evils will, in fact, occur if the unemployment compensation tax is imposed upon religious schools is rather unconvincing. There is certainly room for doubt that the prospect of increased operating costs would truly deter people for whom the propagation of religious faith is of paramount importance, as it is for plaintiffs in this case, from terminating a teacher for religious reasons. However, even if that initial problem is ignored, the mere statement of plaintiffs' position reveals that the adverse effects predicted are both indirect and entirely derived from the cost increases generated by placing religious schools within the scope of the unemployment compensation scheme. Whatever pressure those with authority to hire or dismiss teachers at religious schools might feel would be entirely financial in nature. There is no suggestion that the extension of the tax to religious schools would abridge rights to the free exercise of religion in any fashion *independent* of the financial burden which accompanies any tax. Nowhere in FUTA or its California counterparts is a direct restriction placed upon the power of administrators of religious schools to discharge school employees for any reason whatsoever, although those statutes may operate to increase the cost of certain terminations. In short, the injury to Free Exercise rights asserted by plaintiffs ultimately comes down to the financial burden imposed

by the extension of the unemployment compensation tax to these schools.

Thus, the extension of the unemployment compensation tax to religious elementary and secondary schools is not a direct prohibition or restraint of any religious practice or belief. Similarly, applying the tax to religious institutions should not be equated with the imposition of the type of direct license fee on specific religious acts by individuals which the United States Supreme Court found constitutionally infirm in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Follett v. McCormick*, 321 U.S. 573 (1944). In *Murdock*, the Court invalidated a municipal ordinance which required the payment of a license tax as a condition of engaging in door-to-door solicitation as the ordinance applied to itinerant members of Jehovah's Witnesses who sold religious books and pamphlets. In *Follett*, the Court struck down a similar license tax imposed on book agents as applied to a resident evangelist and member of Jehovah's Witnesses who made his living selling similar publications. In each case, the Court found the activities of the purveyors of religious publications to be individual religious acts entirely analogous in function to the role of preaching sermons in more conventional religions. (*Murdock, supra*, 319 U.S. at 109; *Follett, supra*, 321 U.S. at 576-577). Noting that the power to impose a license tax on the exercise of constitutionally guaranteed privileges implies the power to control, or even suppress, the enjoyment of the privileges (*Murdock, supra*, 319 U.S. at 112; *Follett, supra*, 321 U.S. at 577), the Court, in each case, held that the ordinance under review infringed the freedom of speech and religion guaranteed by the First Amendment.

Although the unemployment compensation tax is an excise tax in form, it is in all other material respects different from the license fees invalidated in *Murdock* and *Follett*,

supra. First, the unemployment compensation tax in the present context, is collected from religious institutions, not from individual religious believers. Second, the unemployment compensation tax is imposed upon the employment relationship and not upon individual religious acts. Of course, the line between the religious and secular aspects of employment at a religious school is not an altogether clear one. It is true that individual teachers and administrators may view their work as a religious calling and that the primary purpose of religious schools is to inculcate religious doctrine. It is also true that administrators of religious schools may hire or terminate employees on religious grounds. However, none of the foregoing facts transforms the hiring or firing of a teacher, or the payment of his salary, from a secular to a religious act analogous to preaching. To hold otherwise would be to adopt the view that any thing or activity remotely connected to the exercise of religion or to those who engage in it is constitutionally immunized from taxation. That no such view was intended by the United States Supreme Court in *Murdock* and *Follett, supra,* is demonstrated by *dicta,* in both cases, expressly approving the taxation of the income of ministers or of church property (*Murdock, supra,* 319 U.S. at 112; *Follett, supra,* 321 U.S. at 578).

Finally, the unemployment compensation tax does not share some other features of flat license fees which the United States Supreme Court found objectionable in *Murdock, supra*. For example, the Court in *Murdock* specifically identified, as part of a list of vices inherent in flat license fees, that such fixed fees are unrelated to the scope of the activities of those taxed and are in no way apportioned. (*Murdock, supra,* 319 U.S. at 105-106). This is not true of the unemployment compensation tax. If a non-profit employer elects the "reimbursement method" of contribution,

its tax payments depend entirely on its employment history, for it will contribute only the amount of benefits actually found due to its former employees who leave or are discharged.[27] If the employer contributes according to the "tax rate" method,[28] the size of its tax payments varies both with the number of its employees and its past employment history. Thus, the unemployment compensation tax is quite different from the license taxes held unconstitutional in *Murdock* and *Follett, supra,* and those cases therefore do not support plaintiffs' contention that the tax, as applied to religious elementary and secondary schools, violates the Free Exercise Clause.

It is thus apparent that the extension of the unemployment compensation tax to religious elementary and secondary schools is neither a direct prohibition of any religious practice nor a direct license tax on individual religious acts. However, plaintiffs quite correctly point out that the classification of a burden upon religion as "indirect" and purely financial does not automatically immunize the statute imposing the burden from further scrutiny under the Free Exercise Clause. *Sherbert v. Verner, supra,* 374 U.S. at 403-404; *Braunfeld v. Brown, supra,* 366 U.S. at 606-607. The Court in *Braunfeld* summarized the further inquiry necessary as follows:

> Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is

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[27] *See* 26 U.S.C. § 3303(e), § 3309(a)(2) and Cal. Unempl. Ins. Code § 801 *et. seq.*

[28] *See* 26 U.S.C. § 3302(a)(1) and Cal. Unempl. Ins. Code § 901 *et. seq.*; § 976 *et. seq. See also Comment: Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws* 25 VILLANOVA L. REV. 69, 77-8 (1979).

> to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Braunfeld v. Brown, supra, 366 U.S. at 607.

The question of whether the application of the unemployment compensation tax scheme solely to the Category 3 employees, as the Court's interpretation of the federal and state statutes under review requires, discriminates between religions will be treated later in this Second Supplemental Opinion. If that question is put aside, however, it is manifest that the unemployment compensation tax scheme meets the *Braunfeld* criteria for validity under the Free Exercise Clause. The historical problems which led to the enactment of the federal statutory framework of the employment compensation scheme were noted in this Court's initial Opinion of September 21, 1979. It is clear that the alleviation of the suffering which results from periods of unemployment is a thoroughly secular legislative purpose and one entirely within the power of Congress to adopt. A list of similarly secular and permissible purposes, reflecting the California legislature's concern for the economic hardship, dislocation, and instability caused by unemployment, appears at Cal. Unempl. Ins. Code § 100. Indeed, anyone having the slightest familiarity with the history of the Great Depression can have no doubt that the interest which the various unemployment compensation statutes have been designed to serve is a compelling one. The gradual extension of unemploy-

ment compensation tax coverage over the last thirty years reflects an attempt by Congress and the state legislatures to serve that interest more comprehensively. Nothing before this Court indicates that the primary effect of the unemployment compensation scheme has been anything other than the provision of the kind of relief for which it was designed.

Moreover, the unemployment compensation scheme has sufficient flexibility to permit religious schools brought within its scope some degree of control over the extent and timing of whatever financial burden they may face. Indeed, the fact that such schools have the option of choosing between alternative contribution methods[29] seems to reflect an attempt on the part of Congress and the California legislature to allow non-profit organizations to select the method of payment least likely to result in financial disruption. This effort at minimization of the unemployment compensation tax scheme's financial impact upon the plaintiffs, together with the importance of the interests served by the scheme and the indirect and purely financial nature of the burden it imposes upon the plaintiffs, all compel the conclusion that no violation of the Free Exercise Clause results from the inclusion of the employees of religious schools in the unemployment compensation tax scheme.

C. THE ENTANGLEMENT PROBLEM

In this Court's Opinion of September 21, 1979, two distinct types of entanglement of the state with religion were indentified as constitutional defects in the unemployment compensation tax scheme as applied to the various schools involved in these cases. The first form of entanglement identified was the excessive monitoring of the activities of

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[29]*See* authorities cited in nn. 25 & 26, *supra*.

church-affiliated school employees necessary to determine which employees fell within the exemptions of 26 U.S.C. § 3309(b)(1)(A) and (B). The entanglement of the "monitoring" variety was entirely a product of the Secretary of Labor's interpretation of the statute, which required the states to determine whether employees at the church-affiliated schools devoted over 50% of their time to "strictly church duties." As discussed above, this form of entanglement disappears once the Secretary's interpretation of the statute is rejected and the Court's "plain meaning" approach is adopted. Under the Court's interpretation, the employees of church-affiliated schools, whether those schools are unincorporated or separately incorporated, (*i.e.*, Category 1 and 2 employees) are clearly exempt, regardless of the exact nature of their activities. Equally clearly, the employees of religious schools not affiliated with churches (*i.e.*, Category 3 employees) are subject to the tax, regardless of the precise tasks they perform.

However, the Court, in its initial Opinion of September 21, 1979, identified briefly a second form of entanglement which does not disappear with the rejection of the Secretary's proposed statutory construction. This second form of entanglement arises in the context of the benefit eligibility determination process which occurs when a covered employee is discharged. Under § 3309(a)(10)[30] of the Federal Unemployment Tax Act and § 1256 of the California Unemployment Insurance Code, an employee subject to the employment compensation scheme is disqualified from receiving the benefits to which he would otherwise be entitled if he is discharged for misconduct. Determining whether a discharge is based on employee misconduct is, of course,

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[30]26 U.S.C. § 3304(a)(10).

a function performed by the state officer who administers the unemployment compensation program.

The entanglement problem arises in the benefit determination process not only with respect to the church-affiliated religious schools but also with respect to the religious schools without formal church affiliation. The non-church-affiliated schools are devoted to the advancement of fundamentalist Christianity and are operated by "born-again" Christians. In such institutions, adherence to the tenets of fundamentalist Christianity is a condition of employment, and the discharge of an employee for failure to observe all aspects of that creed, whether in the school or in private life, is viewed as a discharge based on misconduct, Indeed, even the Secretary's witnesses at trial, who were experienced in the administration of the benefit determination process, conceded that, in appropriate circumstances, a discharge for such religious reasons could qualify as a discharge for "misconduct" and operate to disqualify the terminated employee from receiving unemployment benefits. Obviously, such religiously-motivated discharges would be reviewed by the state officers administering the unemployment compensation program in benefit determination proceedings. And in such proceedings, these officers would be called upon to resolve questions of religious doctrine in the process of determining eligibility, thus entangling the state with religion in a constitutionally impermissible manner.

The need to decide questions of dogma in the course of benefit determinations could arise in a number of ways. At the simplest level, a state hearing examiner could become embroiled in religious controversy while reviewing the case of a teacher discharged from a religious school over an honest disagreement on a particular point of doctrine. For example, though certain fundamentalist tenets (*e.g.*, op-

position to drinking) are clear from the record and quite well known, there are other issues upon which the fundamentalist view is not widely disseminated or upon which fundamentalists are themselves divided. Suppose, then, that a teacher who either lectured on a particular topic in the classroom or simply made known his position on it were discharged by the principal of a fundamentalist school for departure from doctrine. Suppose, further, that the principal contended, and the teacher denied, that a position opposed to that taken by the teacher was a tenet of fundamentalist Christianity, and that the teacher had promised in his employment contract that he would abide by all fundamentalist principles. To determine whether the teacher's discharge was based on misconduct, so as to disqualify the teacher from benefits, the state hearing examiner reviewing the case would obviously be forced to decide whether the teacher's or the principal's position is mandated by the fundamentalist creed.

The entanglement of the state with religion threatened by the need for unemployment compensation program administrators to adjudicate doctrinal disputes is magnified even further by the fact that not all possible sources of doctrinal controversy revolve around easily comprehensible proscriptions or permissions of specific conduct. One of the Secretary's witnesses conceded that an employment relationship may be subject to "implied rules," discharge for the violation of which could be a discharge based on misconduct. The same witness also admitted that these implied rules would vary from one religious sect to another on the basis of doctrinal differences. Moreover, certain religious commands or prohibitions seem inherently incapable of precise definition. One example presented at trial is the case of a teacher discharged for lack of "religious fervor." The discharged teacher and the school principal may well agree

that "religious fervor" is a fundamentalist requirement and a condition of employment. However, they could still disagree vehemently concerning whether a particular pattern of conduct, admitted by both, amounted to a lack of religious fervor. The hearing examiner would be forced to decide that religious issue in order to determine whether the employee was entitled to benefits.

The Secretary argues that these problems of entanglement can be avoided by a state's adoption of a rule that an employee's *understanding* of the terms and conditions (including the doctrinal conditions) of his or her employment is decisive in benefit eligibility proceedings involving alleged employee misconduct. Thus, in the first of two hypotheticals posed above, the employee would be guilty of misconduct only if he *knew* that the school principal's position was required by fundamentalist doctrine and deliberately disregarded that requirement.

The Secretary's argument with respect to the entanglement problem fails for two reasons. First, it underestimates the complexity of religious faith. In effect, the Secretary's approach requires religious schools wishing to make adherence to religious doctrine a condition of employment to develop and explain to prospective employees detailed, all-encompassing articles of religious belief. Such a task could never be accomplished. It should be obvious that not all doctrinally-based "implied work rules" can be prescribed in advance; nor can religious ideals like "fervor," which may be satisfied or breached by infinitely varied patterns of conduct, be precisely defined.

Second, the adoption of a rule making the employee's subjective understanding of his employment terms decisive would embroil the hearing examiner in credibility questions which can only be resolved by involvement in religious issues. For example, the fundamentalist school principal

confronted with a claim by a teacher fired for advocacy of a particular doctrine or practice that his *understanding* of fundamentalist doctrine did not require opposition to that doctrine or practice might well wish to challenge the credibility of the teacher's assertion by establishing that such opposition *really is* mandated by fundamentalist doctrine and that alleged ignorance of that fact *must* be feigned. Similarly, a teacher fired ostensibly for religious reasons might wish to show that the religious reasons advanced for the discharge were a pretext by showing that the reasons asserted were not an accurate statement of the tenets of fundamentalist faith., In short, there are so many ways in which doctrinal questions could become material to benefit eligibility determinations that decisions on religious issues by secular administrators is, in this Court's opinion, inevitable if fundamentalist schools typified by some of the plaintiffs in the Grace Brethren case[31] are subjected to the benefit determination process.

This inevitable involvement of secular officials in religious disputes runs afoul of the constitutional prohibition against excessive entanglement between the state and religion which has been settled law at least since *Lemon v. Kurtzman, supra*. Indeed, the injection of secular decision-makers into essentially religious disputes seems to be one of the more odious forms of First Amendment violation. For example, the United States Supreme Court, in *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969), held that a state civil court was prohibited by the First Amendment from adjudicating a church property dispute between a local church and its former parent organization because

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[31]The independent fundamentalist schools in question are Redwood Christian Schools and Christian Unified Schools of San Diego. The Court's arguments and conclusions would also apply, however, to the church-affiliated schools represented by the plaintiffs in both cases.

resolution of the property dispute required that the state court decide whether the parent church had "substantially departed" from its prior doctrine. Though the United States Supreme Court recognized that a state civil court is normally a perfectly appropriate forum for property disputes, including those involving church property, it held that any dispute which turned on ecclesiastical questions, such as the interpretation or importance of particular religious doctrines, could not constitutionally be decided by such a court. (*Id.*, 445, 450) Similarly, in *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), the United States Supreme Court held that the First Amendment precluded civil court review of the decisions of church tribunals, not only on matters of substantive doctrine, but even for compliance with the procedural requirements ofecclesiastical law.

Finally, the history of *NLRB v. Catholic Bishop, supra*, furnishes strong support for this Court's conclusion that the need for state officials to decide religious questions in the course of benefit eligibility determinations involving former employees of religious schools is a form of entanglement prohibited by the First Amendment. In the Seventh Circuit opinion in that case (*sub. nom. Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112 (7th Cir. 1977), *aff'd* 440 U.S. 490 (1979)), the Court held that the First Amendment prohibited the National Labor Relations Board ("NLRB") from exercising jurisdiction over certain Catholic secondary schools. As one of the various constitutional vices in the NLRB's exercise of such jurisdiction, the Court specifically mentioned the entanglement of the NLRB in doctrinal matters which would result from the adjudication of unfair labor practice charges against the Catholic schools (559 F.2d at 1125). In fact, one illustrative example of such entanglement used by the Court was the case of a teacher ostensibly discharged for departure from Catholic tenets who claimed

that the religious reasons advanced for the discharge were a mere pretext for a discharge motivated by anti-union animus. It was the view of the Seventh Circuit that the NLRB, in processing an unfair labor practice charge filed by such a teacher, would be required to inquire into the validity, as part of church doctrine, of the reasons advanced for the discharge. (*Id.*) The similarity of the Seventh Circuit's concern over the possible role of religious questions in unfair labor practice proceedings and this Court's concern over the role of the same questions in unemployment benefit determinations is obvious.

On appeal, the United States Supreme Court affirmed the decision of the Seventh Circuit (*NLRB v. Catholic Bishop, supra*), albeit on different grounds. Specifically, the Court held that, because the exercise by the NLRB of jurisdiction over Catholic secondary schools would present a significant risk of infringement of First Amendment rights, the labor statutes would be construed in a manner which did *not* confer such jurisdiction on the NLRB. Thus, although the United States Supreme Court did not expressly decide the constitutional issues resolved by the Seventh Circuit, it did identify the possible First Amendment violations *threatened* by the NLRB's exercise of jurisdiction. Among the possible constitutional vices mentioned was the prospect that the NLRB would become excessively entangled with religion in the course of unfair labor practice proceedings. (440 U.S. at 502).

> The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry

leading to findings and conclusions. [Footnote omitted] (*Id.*)

Thus, the United States Supreme Court has consistently taken the position that the resolution of questions of faith and doctrine by secular tribunals is proscribed by the First Amendment, and its latest pronouncement seems to classify religious decisions by secular officials specifically as a form of impermissible entanglement with religion. Since such entanglement is inevitable during the benefit eligibility determination process if religious schools are brought within the scope of the unemployment compensation tax scheme, constitutional considerations bar the application of the scheme to them.

D. THE DISCRIMINATION PROBLEM

The non-church-affiliated fundamentalist school plaintiffs in the Grace Brethren case raise one further constitutional objection to the extension of unemployment compensation tax coverage to them. Essentially, they argue that the exemption scheme embodied in 26 U.S.C. § 3309(b)(1)(A) and (B) and Cal. Unempl. Ins. Code § 634.5(a)(1) and (2) arbitrarily discriminates against religious schools without church affiliation and in favor of religious schools controlled and operated, directly or indirectly, by the institutionalized religious sects or denominations. The discrimination arises from the fact that the statutes under consideration, when construed according to their plain meaning, impose the financial burden of the unemployment compensation tax upon the independent religious schools while exempting the church-affiliated schools. The Grace Brethren plaintiffs argue that this disparate treatment of church-affiliated and non-church-affiliated schools is a violation of the Equal Protection Clause.

Certainly, the evidence before the Court demonstrates that there is a basic similarity between the independent fundamentalist schools in the Grace Brethren case and the church-controlled schools in both cases. The church-affiliated and non-church-affiliated schools in the two cases are virtually indistinguishable in religious mission. The overriding purpose of all the schools is to instill religious values and beliefs in young people. In each school, an attempt is made to create an environment in which religion is pervasive. An effort is made to teach all subjects, including those traditionally regarded as secular, from a religious perspective, and religion permeates extra-curricular activities as well. Indeed, an observer untrained in Christian doctrine might well have difficulty differentiating the church-affiliated schools from the independent fundamentalist schools. Thus, whatever the merits of plaintiffs' Equal Protection argument may be, it would seem that, as exercises of religion worthy of First Amendment protection, there is little to distinguish the operation of an independent fundamentalist elementary or secondary school from the operation of a school formally owned or controlled by an established denomination such as the Lutheran Church-Missouri Synod. As the Second Circuit has noted:

> It is the suffusion of religion into the curriculum and the mandate of the faculty to infuse the students with the religious values of a religious creed which create the conflict with the Religion Clauses and not the vesting of legal title or the responsibility of operation.

NLRB v. Bishop Ford Central Catholic High School, 623 F.2d 818, 823 (1980) *petition for cert. filed*, 49 U.S.L.W.

3496 (U.S. Dec. 22, 1980) (No. 80-1069).[32] By classifying schools according to formal church affiliation, rather than religious mission and curriculum content, and by subjecting non-church-affiliated schools to a financial burden from which church-affiliated schools are exempt, Congress and the California legislature have accorded differential treatment to religious organizations which may well have equal status under the First Amendment. However, since this Court has already determined that application of the unemployment compensation scheme to employees of the schools involves impermissible entanglement of the state with religion, it is not necessary to reach the merits of the Grace Brethren plaintiffs' Equal Protection argument.

III. APPROPRIATE RELIEF

In its Opinion of September 21, 1979 and June 2, 1980, this Court discussed the issues surrounding the propriety of injunctive relief against the California Employment Development Department and its Director. The Court concluded that the Tax Injunction Act (28 U.S.C. § 1341) did not bar injunctive relief and that, at least with respect to Category 1 and 2 employees, the requirements for the issuance of a preliminary injunction were otherwise satisfied. Nothing in the subsequent history of this case has changed this Court's opinion with respect to the propriety of granting injunctive relief in favor of Category 1 and 2 employees. In addition, it is clear that the Category 3 religious school employees

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[32]In the *Bishop Ford* case, the Second Circuit held that the Supreme Court's restrictions on the jurisdiction of the NLRB established in *NLRB v. Catholic Bishop, supra,* were not limited to parochial schools owned by the Catholic Church, but applied to a Catholic school which had severed its legal connection to the local Catholic Diocese. The Court expressed the opinion that the religious character of the purposes, curriculum, and values of a school, rather than its formal church affiliation or lack of affiliation, was the decisive factor in determining its protected status under the First Amendment. 623 F.2d at 823.

are also entitled to injunctive relief against the state. Like their counterparts in the church-affiliated schools, the Category 3 employees will suffer irreparable injury if an injunction is not issued. Moreover, just as the remedies at law available to the Category 1 and 2 employees were previously found inadequate to alleviate the unconstitutional entanglement of the state with religion in the *exemption* determination process, the same remedies must also be classified as inadequate to alleviate the unconstitutional entanglement involved in the *benefit eligibility* determination process. The Court's injunction against assessment and collection of the state unemployment compensation tax must, therefore, be extended in favor of all of the plaintiffs and made permanent.

Moreover, the history of this litigation demonstrates the need for injunctive relief against the Secretary if the plaintiffs are to be accorded complete relief. The entire controversy arose because the Secretary adopted an erroneous construction of 26 U.S.C. § 3309(b)(1) and attempted to force the states to conform their respective unemployment compensation programs to it. As this Court noted in its initial discussion of plaintiffs' standing to sue the Secretary,[33] the Secretary's authority to decertify a state unemployment compensation program pursuant to 26 U.S.C. 3304(c) is a source of overwhelming pressure on a state to alter its program according to the Secretary's construction of federal law, even if the Secretary's construction is unreasonable. Thus, any suggestion by the Secretary that his statutory interpretation is not a link in the causal chain leading to plaintiffs' injury must be rejected in that it fails to take into account the practical reality of the situation.

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[33]See the Court's Opinion of September 21, 1979, at pp. 5-7.

The Secretary initially avoided the issuance of a preliminary injunction against him by representing to the Court that he would not decertify California's unemployment compensation program if the state's failure to follow his interpretation of § 3309(b)(1) was due to compliance with the Court's injunction. The Secretary's assurances proved to be short-lived. When the state defendants failed to take an immediate appeal from this Court's preliminary injunction, the Secretary commenced decertification proceedings against the State of California. This renewed attempt to force the state defendants to accept the Secretary's interpretation and to require the imposition of unemployment compensation taxes upon the plaintiffs unquestionably demonstrates the need for injunctive relief against the Secretary.

The Secretary, in a somewhat cursory manner, has argued that such injunctive relief is precluded by the Anti-Injunction Act, 26 U.S.C. § 7421. That statute provides, in pertinent part:

> Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C. § 7421(a). A similar argument against the propriety of *declaratory* relief is possible because of the exception for controversies involving federal taxes found in the general grant of authority to award declaratory relief in

28 U.S.C. § 2201.[34] Because the limits which these two statutes impose upon the jurisdiction of the federal courts are coterminous in scope,[35] only the objection to injunctive

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[34]28 U.S.C. § 2201 provides:

> In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes* other than actions brought under section 7428 of the Internal Revenue Code of 1954, or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. [Emphasis added]

[35]The United States Supreme Court has declined to resolve the question of whether the federal tax exception to the Declaratory Judgment Act in 28 U.S.C. § 2201 is coextensive with, or broader than, the scope of the prohibition of the Anti-Injunction Act in 26 U.S.C. § 7421. The Court has only held that the federal tax exception to the Declaratory Judgment Act is "at least as broad" as the Anti-Injunction Act. *See Bob Jones University v. Simon*, 416 U.S. 725, 732-3 n.7. The Court did, however, cite several lower court decisions holding that the two statutes are coterminous in application (*Id.*). At least one commentator has identified that conclusion as the majority view among the courts which have squarely faced the issue of the comparative scope of 26 U.S.C. § 7421 and the federal tax exception to 28 U.S.C. § 2201. *See* Asofsky, P.H., *Injunctions and Declaratory Judgments in Federal Tax Controversies*, 28 RUT.L.REV. 785, 799-800 (1975), and cases cited therein. *See also Chapman v. Alexander*, 421 F. Supp. 930 (W.D. La. 1976), *aff'd* 552 F.2d 367; *Dietrich v. Alexander*, 427 F. Supp. 135 (E.D. Pa. 1977). This Court finds particularly persuasive a series of cases from the District of Columbia Circuit in which the two statutes were held to be coterminous. *Eastern Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974), *vacated on other grounds sub. nom. Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *"Americans United", Inc. v. Walters*, 477 F.2d 1169 (D.C. Cir. 1973), *rev'd on other grounds sub. nom. Alexander v. "Americans United", Inc.*, 416 U.S. 752 (1974); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court). In those cases, the conclusion that the two statutes are coterminous was supported, in part, by the inherent paradox in construing the power to grant injunctive relief in federal tax cases more broadly than the power to grant declaratory relief, and in part by an analysis of the legislative history of the federal tax exception in 28 U.S.C. § 2201, which indicated that that exception was added to the Declaratory Judgment Act specifically for the purpose of preventing taxpayers from using the declaratory relief available under § 2201 as a means to circumvent the prohibition of the Anti-Injunction Act. This Court is of the opinion that, for the same reasons, the Ninth Circuit would also regard the two statutes as coterminous in spite of its earlier implication to the contrary in *Martin v. Andrews*, 238 F.2d 552 (9th Cir. 1956). Aside from the greater inherent sense of the position developed subsequently by the D.C. Circuit, the Ninth Circuit's sug-

relief based on the Anti-Injunction Act will be considered explicitly.

The most obvious answer to the Secretary's challenge to the Court's power to order injunctive relief against him is that the statute upon which he relies is inapplicable. 26 U.S.C. § 7241(a) operates to bar suits for injunctions against the assessment or collection of *federal* taxes. *See Enochs v. Williams Packing Co.*, 370 U.S. 1, 5 (1962). However, the plaintiffs in this case do not seek to be relieved of any federal tax liability. All the schools involved in both of the cases before the Court are exempt from *federal* unemployment tax liability by virtue of 26 U.S.C. § 3306(c)(8). Indeed, even the Secretary, when objecting to plaintiffs' standing to sue the federal defendants, argued that the only financial burden to which plaintiffs have been subjected is the result of *state*-imposed unemployment compensation and disability taxes. The Court has, of course, recognized that the Secretary's erroneous interpretation of federal law is causally responsible for the construction of *state* law which resulted in the imposition of those state taxes on church-related schools. That is, indeed, the major reason plaintiffs have standing to sue the Secretary. However, the fact that the extension of the state taxes under consideration to church-affiliated schools was, in large measure, a result of the Secretary's interpretation of federal law does not alter their character as *state* taxes. Thus, § 7421 is literally inapplicable, and, since the Court has already considered, and rejected, a challenge to its power to enjoin the collection of *state* taxes based on 28 U.S.C. § 1341, there would appear to be no barrier to an award of injunctive relief against both the federal and state defendants.

Nevertheless, the Court recognizes that, because of the last clause of 26 U.S.C. § 7421(a), *i.e.*, "whether or not such person is the person against whom such tax was as-

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gestion, in *Martin*, that the Anti-Injunction Act is subject to exceptions to which the bar of the federal tax provision of the Declaratory Judgment Act is not subject was unnecessary to the disposition of the case. *See* Asofsky, *supra*, 28 RUT. L. REV. 800, n. 81.

sessed", and certain expansive language in the cases decided under § 7421,[36] there is some basis for arguing that § 7421 applies to the instant cases. Thus, it could be argued, enjoining the Secretary from interpreting § 3309(b)(1) so that the employees of church-related schools must be covered under state's unemployment compensation program, and from forcing the state to adopt a similar construction of its own law, is tantamount to enjoining the Secretary from instituting decertification proceedings against the state. Absent such an injunction, the Secretary would be free to prosecute decertification proceedings if he chose to do so, and it is possible that he might be successful in those proceedings. If the Secretary did prevail in decertification proceedings, the employers in the state who are covered under the Federal Unemployment Tax Act would lose the credit against the federal tax which 26 U.S.C. § 3302(a) provides for contributions to a *certified* state unemployment compensation plan. Obviously, in that case, the federal unemployment tax liability for the state's employers would be increased as a result of the decertification. Thus, it could

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[36]For example, the United States Supreme Court has said:

> Section 7421(a) does not bar merely a taxpayer's attempt to enjoin the collection of his own taxes. Rather, it declares in sweeping terms that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." [Footnote omitted] Thus a suit to enjoin the assessment or collection of anyone's taxes triggers the literal terms of § 7421(a).

Commissioner v. "Americans United", Inc., 416 U.S. at 760. Similarly, the Ninth Circuit has stated:

> Likewise, this statutory ban against judicial interference with the assessment or collection of taxes "is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes." *United States v. Dema*, 544 F.2d 1373, 1376 (7th Cir. 1976), *cert. denied* 429 U.S. 1093, 97 S.Ct. 1106, 51 L.Ed.2d 539 (1977).

Blech v. United States, 595 F.2d 462, 466 (9th Cir. 1979).

be argued, an injunction against the Secretary precludes a *potential* increase in federal tax receipts, and such an injunction is, therefore, a restraint against the assessment or collection of a federal tax within the meaning of § 7421(a).

The foregoing argument need only be stated to reveal that the potential effect on federal tax revenues upon which the argument relies is not only indirect, but highly contingent as well. This Court has grave doubts that § 7421 should be triggered whenever relief is requested which has some conceivable impact on federal tax receipts.[37] However, assuming *arguendo* that the foregoing argument is accepted and § 7421 is applicable, the instant case falls within a narrow exception to the prohibitions of § 7421 formulated in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962) and reaffirmed in *Bob Jones University v. Simon*, 416 U.S. 725 (1974) and *Commissioner v. "Americans United" Inc.*, 416 U.S. 752 (1974). In order to qualify for this exception and escape the ban on injunctive relief codified in § 7421, the proponent

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[37]The Court is aware that in the companion cases of *Bob Jones University v. Simon*, 416 U.S. 725 (1974), and *Commissioner v. "Americans United", Inc.*, 416 U.S. 752 (1974), the United States Supreme Court found § 7421 applicable and operative to bar a suit to enjoin the revocation of an Internal Revenue Service ruling letter classifying a particular organization as tax-exempt under 26 U.S.C. § 501(c)(3). In each case, one purpose of the plaintiff organization's suit was to prevent its donors from losing the tax deduction which 26 U.S.C. § 170 provides for contributions to organizations which qualify under § 501(c)(3). The donors' potential loss of a deduction in those cases is somewhat analogous to the potential loss of the § 3302 tax credit for contributions to a certified state unemployment compensation fund faced by employers covered under FUTA in the event the Secretary decertifies a state program. Although this Court is of the opinion that *Bob Jones University* and *"Americans United"* are distinguishable from the instant cases, both because the plaintiff in each of the former cases had some federal tax liability of its own and because the possibility of an effect on federal tax revenues in the instant cases is somewhat more speculative, it is arguable that the two cases cited above make § 7421 applicable to the instant cases. For that reason, a discussion of an exception to § 7421 has been included below.

of injunctive relief must demonstrate, first, that his success on the merits of his case is certain (*i.e.*, that, under no circumstances could the government prevail in an attempt to enforce the tax in issue) and, second, that irreparable injury would occur absent an injunction. *Enochs v. Williams Packing Co.*, 370 U.S. at 7; *Bob Jones University v. Simon*, 416 U.S. at 737; *Commissioner v. "Americans United" Inc.*, 416 U.S. at 758, 762. Moreover, the likelihood of the government's success in enforcing the tax in dispute is to be assessed on the basis of information available to the government at the outset of the lawsuit in which injunctive relief is sought. *Enochs v. Williams Packing Co.*, 370 U.S. at 7; *Bob Jones University v. Simon*, 416 U.S. at 737. Thus, the criteria for applying the exception to § 7421 are quite strict, and only a narrow range of cases will escape the ban on injunctive relief in cases involving federal taxes.

The instant case unquestionably fits within the narrow scope of the exception. This Court has already indicated that the second component of the *Williams Packing* test is satisfied. The injury which would be inflicted by permitting the Secretary to continue to interpret § 3309(b)(1) erroneously and to force the states to adopt his interpretation is irreparable, both because it involves the deprivation of constitutional rights[38] and because the available legal rem-

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[38]See discussion and cases cited in the Court's Opinion of September 21, 1979, pp. 13-16. This Court is, of course, aware of the language in *Commissioner v. "Americans United", supra*, to the effect that the constitutional nature of a taxpayer's claim, "as distinct from its probability of success" is "of no consequence" under the Anti-Injunction Act. However, read in context, this language does *not* reflect a view on the part of the United States Supreme Court that *constitutional* injury cannot be *irreparable* injury sufficient to satisfy the second prong of the test for an exception to the Anti-Injunction Act. Rather, the point of the language is that the fact that the injury alleged is constitutional in nature is no *substitute* for satisfaction of the *first* prong of the test for an exception to the statute's prohibition, *i.e.*, certainty of success on the merits. Even if a taxpayer's claim to an injunction is *constitutional* in nature, he must show that he is entitled to prevail on it.

edies (*e.g.*, refund suits) are incapable of redressing non-financial forms of injury like the *intrusion* involved in excessive entanglement of the state with religion.

The first prong of the *Williams Packing* test, *i.e.*, certainty of success on the merits, is also satisfied, and it was satisfied at the beginning of this litigation. All of the information necessary to decide the issue of the propriety of the Secretary's construction of § 3309(b)(1) was known to the Secretary and before the Court when the complaints were filed. Thus, at the outset of the litigation, without the development of further facts, it was clear that under no circumstances could the Government prevail on the merits on the question of the plain meaning of the statute. Similarly, once the Secretary's "strictly church duties" test was understood, it was quite obvious that its enforcement would require excessive monitoring of the activities of employees of church-affiliated schools. Indeed, from the outset, there was never any serious dispute that such monitoring was occurring. Likewise, the Court had no doubt at any time that such monitoring fell within the constitutional prohibitions against excessive entanglement of the state with religion enunciated in *Lemon v. Kurtzman, supra,* and the other decisions of the United States Supreme Court which have been discussed. Thus, insofar as the injury to plaintiffs was traceable to the Secretary's actions and interpretation of federal law, plaintiffs' success on the merits, on both statutory and constitutional grounds, was certain at the time the suits were filed. Therefore, even if the instant cases involve the type of suit to which 26 U.S.C. § 7421 applies, the requirements for an exception to the statute's ban on injunctive relief are met. Accordingly, appropriate injunctive

relief will issue against the federal, as well as the state, defendants.[39]

DATED:

MARIANA R. PFAELZER
United States District Judge

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[39]At this time, the Court has no information indicating what response, if any, the Secretary will make to the Court's conclusion that the state defendants may not constitutionally impose the state unemployment compensation tax scheme on the Category 3 employees of non-church-affiliated schools. Since such employees were, under any construction of the relevant statutes, subject to the unemployment compensation scheme, the Secretary concentrated his attention on the Category 1 and 2 employees, whose status his erroneous statutory interpretation affected. If the Secretary, in response to failure by the state defendants to collect unemployment compensation taxes on behalf of Category 3 employees, institutes decertification proceedings against the State of California, the parties may apply to this Court for further relief.

APPENDIX B.

Order and Judgment.

United States District Court, Central District of California.

Grace Brethren Church and Reverend David Hocking, etc., et al., Plaintiffs, v. State of California, etc., et al., Defendants. Case No. CV 79-93 MRP.

Filed: April 3, 1981.

Entered: April 6, 1981.

This cause came on for trial before the Honorable Mariana R. Pfaelzer, sitting without a jury, on August 12 and 13, 1980. The Court, having considered the pleadings, post-trial briefs, evidence and arguments of counsel, has determined that plaintiffs are entitled to relief and that the preliminary injunction granted by the Court by Order of September 21, 1979, and clarified by Order of June 2, 1980, must now be extended in scope and made permanent. Therefore, in accordance with the Findings of Fact and Conclusions of Law contained in the Second Supplemental Opinion filed herewith,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That 26 U.S.C. § 3309(b)(1) and California Unemployment Insurance Code § 634.5(a), if interpreted according to the defendant Secretary of Labor's "strictly church duties" test and applied to schools (whether unincorporated or separately incorporated) which are operated, supervised, controlled, or principally supported by a church or convention or association of churches, are unconstitutional. Both statutes, so interpreted and applied, are incompatible with the Religion Clauses of the First Amendent (as made applicable to the states by the Fourteenth Amendment) because they result in two forms of excessive entanglement of the state with religion:

(a) Intrusive monitoring of the activities of employees of religious schools in order to determine whether or not those employees are exempt from unemployment insurance and disability taxes; and

(b) Involvement of state officials in the resolution of questions of religious doctrine in the course of determining the benefit eligibility of discharged employees of religious schools.

The schools to which this paragraph applies are:

Grace Christian Schools, which are affiliated with plaintiff Grace Brethren Church of Long Beach, California;

Highlands Academy, which is affiliated with plaintiff Calvary Cross Church of the Highlands, located at San Bruno, California; and

2. That 26 U.S.C. § 3309(b)(1) and California Unemployment Insurance Code § 634.5(a), properly interpreted according to their plain meaning, exempt the employees of the schools listed in Paragraph 1 from California unemployment compensation tax and disability taxes.

3. That 26 U.S.C. § 3309(b)(1) and California Unemployment Insurance Code § 634.5(a), properly interpreted according to their plain meaning, do not exempt the employees of plaintiffs Redwood Christian Schools and Christian Unified Schools of San Diego, which are neither churches nor operated, supervised, controlled, or principally supported by a church or convention or association of churches, from unemployment compensation and disability taxes.

4. That, as applied to the employees of plaintiffs Redwood Christian Schools and Christian Unified Schools of San Diego, California Unemployment Insurance Code § 634.5(a) is unconstitutional. That statute, so applied, is incompatible with the Religion Clauses of the First Amend-

ment (made applicable to the states by the Fourteenth Amendment) because it results in excessive entanglement of the state with religion in the form described in Paragraph 1(b) above.

5. That defendants State of California, the California Unemployment Development Department and its Director, and their officers, agents, employees, representatives, and all persons acting under or in concert with them, are hereby permanently enjoined and restrained from collecting, or attempting to collect, unemployment compensation or disability taxes from any of the churches or schools mentioned in Paragraphs 1 and 4 of this Order on behalf of the employees of the schools. The aforementioned defendants are further enjoined from collecting, or attempting to collect, information from the schools or churches mentioned in Paragraph 1 for the purpose of ascertaining whether or not employees of such schools spend at least 50% of their time performing "strictly church duties". Defendants may, without violating this Order, obtain from such schools verification of church affiliation.

6. That the defendants United States of America, United States Department of Labor, United States Secretary of Labor, their officers, agents, employees, representatives, and all persons acting under or in concert with them, are hereby permanently enjoined and restrained from interpreting 26 U.S.C. § 3309(b)(1) in a manner which requires state unemployment compensation plan administrators to collect contributions on behalf of employees of church-affiliated schools who fail to prove that they spend more than 50% of their time performing strictly church duties, and from forcing or attempting to force any other person or agency to adopt such an interpretation.

7. That judgment is hereby entered in favor of plaintiffs.

DATED: March 31, 1981.

/s/ Mariana R. Pfaelzer
MARIANA R. PFAELZER
United States District Judge

APPENDIX C.

Order and Judgment.

United States District Court, Central District of California.

The Lutheran Church-Missouri Synod, a non-profit membership corporation on behalf of 85 member Lutheran Churches, etc., et al., Plaintiffs, v. The State of California Employment Development Department, et al., Defendants. Case No. CV 79-162 MRP.

Filed: April 3, 1981.

Entered: April 6, 1981.

This cause came on for trial before the Honorable Mariana R. Pfaelzer, sitting without a jury, on August 12 and 13, 1980. The Court, having considered the pleadings, post-trial briefs, evidence and arguments of counsel, has determined that plaintiffs are entitled to relief and that the preliminary injunction granted by the Court by Order of September 21, 1979, and clarified by Order of June 2, 1980, must now be made permanent. Therefore, in accordance with the Findings of Fact and Conclusions of Law contained in the Second Supplemental Opinion filed herewith,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That 26 U.S.C. § 3309(b)(1) and California Unemployment Insurance Code § 634.5(a), if interpreted according to the defendant Secretary of Labor's "strictly church duties" test and applied to unincorporated or separately incorporated religious schools which are operated, supervised, controlled, or principally supported by plaintiff Lutheran Church-Missouri Synod ("the Synod") or any of its member Lutheran Churches, are unconstitutional. Both statutes, so interpreted and applied, are incompatible with the Religion Clauses of the First Amendment (as made applicable to the states by the Fourteenth Amendment) because

they result in two forms of excessive entanglement of the state with religion:

(a) Intrusive monitoring of the activities of employees of religious schools in order to determine whether or not those employees are exempt from unemployment insurance and disability taxes; and

(b) Involvement of state officials in the resolution of questions of religious doctrine in the determination of the benefit eligibility of discharged employees of religious schools.

2. That 26 U.S.C. § 3309(b)(1) and California Unemployment Insurance Code § 634.5(a), properly interpreted according to their plain meaning, exempt the employees of unincorporated and separately incorporated religious schools operated, supervised, controlled, or principally supported by the Synod or any of its member churches from the unemployment compensation and disability taxes.

3. That defendants State of California, the California Unemployment Development Department and its Director, and their officers, agents, employees, representatives, and all persons acting under or in concert with them, are hereby permanently enjoined and restrained from collecting, or attempting to collect, unemployment compensation or disability taxes from the Synod or from schools operated, supervised, controlled, or principally supported by the Synod on behalf of employees of such schools. The aforementioned defendants are further enjoined from obtaining or attempting to obtain information from schools affiliated with the plaintiff Synod or its member churches for the purpose of ascertaining whether or not employees of such schools spend at least 50% of their time performing "strictly church duties". Defendants may, without violating this Order, obtain from such schools verification of church affiliation.

4. That the defendants United States of America, United States Department of Labor, United States Secretary of Labor, their officers, agents, employees, representatives, and all persons acting under or in concert with them, are hereby permanently enjoined and restrained from interpreting 26 U.S.C. § 3309(b)(1) in a manner which requires state unemployment compensation plan administrators to collect contributions on behalf of employees of church-affiliated schools who fail to prove that they spend more than 50% of their time performing strictly church duties and from forcing or attempting to force any other person or agency to adopt such an interpretation.

5. That judgment is hereby entered in favor of plaintiffs.

DATED:

/s/ Mariana R. Pfaelzer
MARIANA R. PFAELZER
United States District Judge

APPENDIX D.

Opinion.

United States District Court, Central District of California.

Grace Brethren Church and Reverend David L. Hocking, etc., et al., Plaintiffs, v. State of California, etc., et al., Defendants. Case No. CV 79-93 MRP.

The Lutheran Church-Missouri Synod, a non-profit membership corporation on behalf of 85 member Lutheran Churches, etc., et al., Plaintiffs, v. The State of California Employment Development Department, et al., Defendants. Case No. CV 79-162 MRP.

Filed: September 21, 1979.

At the height of the depression of the 1930's, unemployment in the nation exceeded 25% of the work force.

In an attempt to alleviate some of the resulting hardships, Congress enacted Title IX of the Social Security Act of 1935 (herein "the Act"), Pub. L. No. 94-271, 49 Stat. 620, the forerunner of the Federal Unemployment Tax Act (herein "FUTA") (now codified at 26 U.S.C. §§ 3301-3311). Employers with eight or more employees were made subject to an excise tax computed as a percentage of wages payable for services performed in "employment" as defined in the Act. 49 Stat. 635. The employer was, however, entitled to a credit against his federal tax liability for up to 90% of any contributions to a fund established under a federally approved state unemployment compensation law. 49 Stat. 639-640. In addition, Congress provided in Title III of the Social Security Act (codified at 42 U.S.C. §§ 502-504) for federal grants to the states to pay for costs incurred in administering the state unemployment compensation laws. 49 Stat. 626. Given this incentive, all states enacted such laws, which, in order to meet the requirements for federal approval,[1] essentially paralleled the coverage of FUTA.[2]

The federal unemployment tax provisions remained substantially unchanged for two decades after enactment.[3] Then in the mid-1950's, a steady expansion of unemployment insurance coverage commenced. For example, in 1954 Congress extended the tax liability to employers with four or more employees and enacted an unemployment compensation program for federal employees.[4] In 1958, an unem-

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[1]26 U.S.C. § 3304(a) contains the specific requirements for approval of a state unemployment insurance program.

[2]*See, e.g., Cal. Unempl. Ins. Code* §§ 1-15000 (West 1972).

[3]In 1939, FUTA was made a part of the Internal Revenue Code, 53 Stat. 1, 183.

[4]*See* Pub. L. No. 767, 68 Stat. 1130.

ployment compensation program was enacted for Armed Services employees.[5]

In 1970, § 3304(a)(6)(A) was added to FUTA requiring the states to extend unemployment insurance coverage to employees of non-profit organizations,[6] effective January 1, 1972. Subparagraph (b) of the new § 3309 permitted the states to exclude from coverage those employees performing, *inter alia*, services:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education.

In response to these amendments, the State of California (herein "the State"), extended coverage under the California Unemployment Insurance Code to services performed for non-profit organizations with the exception of those specified in § 3309(b).

Effective January 1, 1978, Congress amended § 3309 by deleting Subsection (b)(3) which permitted exemption of services performed by individuals "in the employ of a school which is not an institution of higher education."

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[5]*See* Pub. L. No. 85-848, 72 Stat. 1087, 1088.

[6]*See* the Employment Security Amendments Act, Pub. L. No. 91-373, 84 Stat. 695. Pursuant to 26 U.S.C. §§ 3301 & 3306(c) (1976), nonprofit organizations are exempt from paying *federal* unemployment insurance tax, even though the federal government requires the state's programs to cover such organizations.

Effective the same date, California amended § 634.5(c) of its Unemployment Insurance Code to maintain consistency with the federal law.

This case arises out of the Secretary of Labor's (herein "the Secretary") interpretation of the 1978 amendment to § 3309(b) as requiring extension of unemployment compensation coverage to employees of primary and secondary religious schools, exempting only those individuals who perform "strictly church duties" during more than half of their working time.[7]

I
THE ISSUES PRESENTED

The plaintiffs in these two cases are religious organizations which operate private elementary and secondary schools. In No. 79-0162 (the "Lutheran" case), plaintiff is a "Synod" consisting of 85 member churches which operate private schools. The Lutheran case was originally brought in the Superior Court of the State of California against the Employment Development Department of the State of California (herein the "EDD"); Martin Glick, its Director; and the Secretary. The case was removed to this court by the Secretary pursuant to 28 U.S.C. §§ 1441 and 1442. Case No. 79-0093 (the "Grace Brethren" case) was originally brought in this court against these same parties. The State has cross-claimed against the Secretary in both cases.

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[7]26 U.S.C. § 3306(d) specifies that "if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment." Subsection (c)(3) of that section excludes from the definition of employment "service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a)."

Both groups of plaintiffs seek a preliminary injunction against the defendants enjoining collection of the unemployment tax with respect to their employees. The Secretary moves for dismissal on the ground that plaintiffs lack standing and that the court lacks jurisdiction to grant the injunctive relief requested by plaintiffs. The Secretary also moves to dismiss the State's cross-claim for declaratory relief on the ground that the State has failed to exhaust administrative remedies. The following discussion will constitute the Findings of Fact and Conclusions of Law in both cases and will apply to both applications for a preliminary injunction as well as to the pending motions.

II
DISCUSSION

A. Standing to Sue the Secretary of Labor

The Secretary argues that since the State's participation in the federal program is voluntary, plaintiffs lack standing to sue him in the present action. It is the Secretary's position that since it is the State which is causing plaintiffs' alleged damage, both cases must be dismissed as to him.

In order for a plaintiff to have standing under Article III, he must establish that "the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45 (1976). However, this does not mean that a plaintiff may not sue a governmental defendant who has caused him indirect rather than direct harm. "When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights." *Warth v. Seldin*, 422 U.S. 490, 505

(1975); *Gladstone Realtors v. Village of Bellwood*, No. 77-1493 (Sup. Ct. April 17, 1979). However, it does make it "substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm" *Warth*, 422 U.S. at 505. The injury may be indirect, *see United States v. SCRAP*, 412 U.S. 669, 688 (1973), but it must be "fairly traceable to the defendant's acts or omissions." *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 261 (1977).

In the present case, the State has for many years maintained an unemployment compensation program upon which a large number of employees depend. If California should fail to remain in accord with FUTA regulations, it risks decertification of its program and the substantial hardship to California employers and employees which would result from termination of its FUTA benefits. Thus, while initial participation in FUTA is voluntary, once a state has established an unemployment compensation program, it is compelled to conform its program to FUTA regulations as they may be amended from time to time.

The fact that the states are under compulsion to adopt the Secretary's interpretation of the modification of § 3309(b) is evidenced by the directive from the U.S. Department of Labor to "All State Employment Security Agencies" from Lawrence W. Rogers, Administrator of Field Operations (herein "the Directive"). The Directive states that "Secretary Marshall's decision concerning unemployment insurance coverage of services performed for church-related schools . . . was clearly intended to result in State coverage of church-related elementary and secondary schools." The Secretary's interpretation was not merely advisory. On the

contrary, the Secretary was fully justified in expecting total compliance by the states.

As further evidence that the Secretary's actions are indeed the cause of the injury to plaintiffs, the State has cross-claimed against the Secretary requesting the court to countermand the Directive. In that cross-claim, the State alleges that it interprets § 3309(b) differently from the Secretary, and that it agrees with plaintiffs' contention that employees of church schools should be exempt. The State further alleges that:

> pursuant to sections 3304(a)(6), 3304(c) and 3309 of the Federal Act, cross-claimants must substantially comply, and are now complying, with the Secretary's interpretation as to which services under such section 3309 must be covered by California for unemployment insurance, and which services may be permissibly excluded by California from unemployment insurance coverage.

Under these circumstances the position that the harm alleged by plaintiffs is the consequence of the State's actions and not those of the Secretary is wholly unrealistic.[8]

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[8]On January 18, 1979, Judge Leroy J. Contie of the United States District Court, Northern District of Ohio, issued a memorandum opinion denying standing to sue the Secretary of Labor in a case virtually identical to the present one. *St. John Lutheran Church, Inc. v. Giles*, 78-1516 (N.D. Ohio, filed January 18, 1979). The opinion stated:

> [t]he Secretary has no power to compel the state to comply with the requirements for certification. An order against the Secretary could not redress the plaintiff's alleged injury because the Secretary has no power to change the state laws of which plaintiff complains. Therefore the plaintiff has no standing to assert a claim against the Secretary, and the Secretary must be dismissed from the action.

Memorandum Opinion at 2-3.

Judge Contie's restrictive analysis of the standing requirements seems contrary to that of the Supreme Court in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974). There the Court found Article III standing on the basis that the State of New Jersey adversely affected

(footnote continued on following page)

B. Propriety of Injunctive Relief

The standard for granting injunctive relief in the Ninth Circuit was set forth in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975) quoting from *Charlie's Girls, Inc. v. Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973):

> One moving for a preliminary injunction assumes the burden of demonstrating *either* a combination of probable success and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor. [Emphasis original.]

Plaintiffs have met not only the second, more flexible test for granting preliminary injunctive relief, but the first, more stringent test as well.

1. Likelihood of Success on the Merits

a. *Meaning of Statute*

As stated above, the Secretary interpreted the 1976 amendment of § 3309 as eliminating the heretofore accepted exclusion for employees of primary and secondary schools operated by churches. However, § 3309(b)(1) exempts those "in the employ of (A) a church . . . or (B) an organization which is operated primarily for religious purposes and which is operated . . . by a church." The employees in these cases clearly appear to fall within category 1(A) of this Section. However, the Secretary appears to argue that they are not entitled to exemption under § 3309 because

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the interests of employers engaged in collective bargaining by offering public assistance to striking workers. Clearly New Jersey could not, by providing or withholding assistance, force or restrain employees from engaging in strike activity. Nevertheless, the Court held there was standing since New Jersey's policy "by its continuing and brooding presence, [cast] what may well be a substantial adverse effect on the interests of the petitioning parties." *Id.* at 122. Here, although the Secretary cannot directly alter state law, the "brooding presence" of possible decertification is capable of constraining state compliance, with substantially adverse effects on the plaintiffs.

they fail to meet the additional requirements of Subsection 1(B) in that the religious schools are not, in his view, operated "primarily for religious purposes."

The simple answer to the Secretary's argument is that the two subsections are disjunctive and compliance with Subsection 1(A) above is sufficient to warrant exemption. The legislative history of § 3309 tends to support the view that religious schools such as the ones here in question which are not separately incorporated, need not meet the standards of Subsection 1(B) in order to insure exempt status.

> This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). *Thus, the services of the janitor of a church would be excluded but services of a janitor for a separately incorporated college, although it may be church related, would be covered.* A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (*separately incorporated*) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.

H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969) [Emphasis added].

This quote indicates that Congress intended the tax to be applicable to the services of employees of *separately incorporated* organizations, but not to church operations run directly by the church with its own employees. Thus, it is

reasonable to infer that Congress did not intend to include church schools within the scope of unemployment compensation.

b. *Unconstitutional Entanglement*

It is well established that a statute should, if possible, be construed to avoid constitutional infirmities. *See, e.g., United States v. Vuitch*, 402 U.S. 62, 70 (1971). The Secretary argues that his interpretation of § 3309(b) does not violate the establishment clause of the First Amendment because taxing a church could in no way be considered "establishment" of religion. Further, there could be no violation of the free exercise clause because although the tax might put some financial burden on the free exercise of religion (*e.g.*, inhibiting a church from firing an employee on religious grounds for fear of having to pay unemployment compensation), this burden is minimal and not *per se* unconstitutional.

However, as stated in *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970);

> [d]etermining that the legislative purpose . . . is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion.

Excessive government entanglement, in and of itself, will result in a violation of the constitutional protections against establishment and the inhibition of free exercise.[9] *See Lemon*

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[9]Although much of the law relating to excessive entanglement is in the context of government support to religious schools, the Supreme Court has made it clear that "[t]he hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation." [Footnote omitted.] *Walz*, 397 U.S. at 675. *See also Catholic Bishop*, 47 U.S.L.W. at 4286-87.

v. Kurtzman, 403 U.S. 602, 612 (1971); *NLRB v. Catholic Bishop*, 47 U.S.L.W. 4283 at 4287 (March 20, 1979).

The entanglement resulting from the Secretary's interpretation stems from the requirement that with respect to these church schools, the states must determine who is subject to the unemployment compensation tax and who is not. In the Directive, states are advised that:

> [i]f an employee performs both non-exempt and exempt services during a single employment period, as in the case of services performed for a church-related school and an organization exempted by section 3309(b)(1), and "if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employees [*sic*] for such period shall be deemed to be employment, but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment," as provided in Section 3306(d), FUTA.

Thus, the State is required to make the determination whether, during any given pay period, an employee has spent more than one-half of his time on purely religious activities. If so, that employee is exempt.

The potential for excessive entanglement in making these decisions is manifest. That religious teaching permeates the curriculum of private religious schools has been clearly acknowledged by the Supreme Court of the United States:

> The analysis of the constitutional objections to these two state systems of grants to parochial or sectarian schools must start with the admitted and obvious fact that the *raison d'etre* of parochial schools is the propagation of a religious faith.

Lemon, 403 U.S. at 628 (Douglas J. concurring.)

Based on its recognition of this permeation, the Court in *Lemon* found the provision of economic support to religious schools to be a potential violation of the establishment clause, even when such support was restricted to supplementing salaries of teachers of purely secular subjects. It is clear that in cases such as *Lemon*, the concern is not only that some of the supported teachers might in fact teach religious doctrine, but more significantly, that entanglement between church and state will necessarily occur when steps are taken to insure that teachers do not engage in religious teaching.

In this case, as in *Lemon*, the inquiry necessarily involved in policing the application of the exemption, "puts a public investigator into every classroom and entails a pervasive monitoring of these church agencies by the secular authorities." *Lemon*, supra at 627 (Douglas , J., concurring). Yet without such monitoring, there would be no way of making the determinations required by the Secretary's interpretation of § 3309. As stated in *Catholic Bishop* "[i]t is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions." 47 U.S.L.W. at 4286-87.

The religious schools in this case argue that all of their courses of study are designed to advance their religious principles. Thus, in order to enforce the tax, it will be necessary for the EDD to determine as to each employee whether their activities are "purely religious" more than one-half of the time. That controversies will arise, for example, as to whether in a world history class the teacher spends more than one-half of any given session teaching purely "religious" or purely "secular" history can hardly

be subject to doubt.[10] And disputes unquestionably will arise in situations where employees are dismissed for cause and the reason given by the church school is failure to adhere to religious tenets of the church.

The type of inquiry necessary to the resolution of controversies such as these is almost identical to that which the Court found to involve dangers of excessive entanglement in *Catholic Bishop*. There, the question was whether a particular action was an unfair labor practice. The resolution of such a charge "in many instances, [would] necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." 47 U.S.L.W. at 4286. Such an inquiry, taken by itself, involves impermissible entanglement of the state with the church, violative of the separation of those entities mandated by the Constitution.

2. Possible Irreparable Injury

Plaintiffs have met their burden of showing that they are likely to suffer irreparable injury if an injunction is not issued against collection of the unemployment compensation tax. Plaintiffs have submitted a number of affidavits showing that inquiries into the religious content of a teacher's activities have already been made by the EDD. For example, on February 27, 1979, the Pilgrim Lutheran Church was required by the EDD to answer a series of questions with respect to thirty-six employees on the church's payroll ledger. Among these questions were the following:

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[10]Plaintiffs, of course, argue that such a determination is impossible to make since they teach all subjects, including history, from a religious perspective. While some events in history may be less amenable to such an approach, e.g., the Civil War, it would seem that much Middle Eastern and European history might well be taught differently if viewed from a strictly religious perspective.

"What services were performed by each individual?"

"Where were the services performed?"

"If performed for both the school and church, what was the percentage for each?"

The church was also asked to identify any "licensed, ordained or commissioned minister(s) among the employees"; to describe the procedures necessary to become a minister; to specify whether the services performed by a minister constitute "the conduct of religious worship or the ministration of sacerdotal functions"; and to state whether the services are "performed pursuant to an assignment or designation by his ecclesiastical superiors." Such inquiry is far more intrusive than that directed to Monsignor O'Donnell which is attached as an appendix to *Catholic Bishop* for the purpose of illustrating how entanglement can result from the "very process of inquiry." The declarations here are replete with examples of inquiry by the State auditors into the religious qualifications of the teachers employed, the content of the subjects taught, and the extent to which the teachers are involved in activities other than teaching. Clearly the unconstitutional entanglement which, even in situations where it is only potential, can invalidate a statute, is occurring on a regular basis at the present time.[11]

It has been held that the deprivation of fundamental constitutional rights constitutes irreparable injury. *Lewis v.*

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[11]One declaration details the visit of an auditor to a preschool. The auditor, after asking detailed questions as to what transpired in the music class, the "nature center" and the "block center," ended by classifying music as strictly religious and the nature and block centers as both religious and secular. There is even a list of exempt employees which was given to one of the church schools at the conclusion of an audit. Among those listed was the church custodian "that % that applies to church (if % is greater for school than 100% salary is taxable)." One wonders how the auditors will determine the percentage of the custodian's time spent on the church versus the church school since the same buildings are frequently used for both purposes.

Kugler, 446 F.2d 1343, 1350 (3rd Cir. 1971); *Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1969); *Green v. Kennedy*, 309 F. Supp. 1127, 1139 (D.D.C 1970), *appeal dismissed* 398 U.S. 956 (1970); *Fortune Society v. McGinnis*, 319 F. Supp. 901, 903 (S.D.N.Y. 1970). In particular, a violation of the establishment clause has been the basis of the issuance of an injunction. *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974). Here, plaintiffs have shown not only potential, but actual violation of the Religious Clauses.

3. Jurisdiction to Grant Relief Requested

The Secretary has argued that even if there were a constitutional violation in the enforcement of § 3309 as interpreted, this court lacks subject matter jurisdiction to grant either injunctive or declaratory relief. The Secretary relies on 28 U.S.C. § 1341 which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a *plain, speedy and efficient remedy may be had in the courts of such State*. [Emphasis added]

As concluded above, the facts of this case justify the issuance of an injunction to prevent the collection of the unemployment tax. However, it appears that this remedy is not available in the state court. Article XIII, section 32 of the Constitution of the State of California provides:

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax.

Similarly, California's Unemployment Insurance Code § 1851 provides:

> No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin the collection of any contribution sought to be collected under this division.

Thus, the availability of injunctive relief in State court is, at best, uncertain.[12]

However, the Secretary correctly points out that the state remedy need not be as effective as the federal remedy, so long as it is plain, speedy and efficient. *Mandel v. Hutchinson*, 494 F.2d 364, 367 (9th Cir. 1974). The Secretary maintains that the declaratory remedies available in state court or the administrative remedies which might be available to plaintiffs are adequate, even if plaintiffs are required to pay the tax and later sue for refund. *See Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Matthews v. Rogers*, 284 U.S. 521, (1932). This is true even when a constitutional violation is alleged. *King v. Sloane*, 545 F.2d 7, 8 (6th Cir. 1976); *Mandel*, 494 F.2d at 366-367; *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), *cert. denied* 410 U.S. 966 (1973); *Helmsley v. City of Detroit*, 320 F.2d 476, 478-79 (6th Cir. 1963).

However, the present case is distinguishable from those cited above. Plaintiffs here claim not merely that the tax unconstitutionally deprives them of their property, as was

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[12]There is some California authority for the proposition that the anti-injunction statute and the constitutional mandate may have some exceptions where a challenge is made to a tax law on the ground that it is unconstitutional. *See, e.g., McKay Jewelers, Inc. v. Bowron*, 19 Cal. 2d 595, 122 P.2d 543 (1942); *Bueneman v. City of Santa Barbara*, 8 Cal. 2d 405, 65 P.2d 884 (1937); *Las Animas & San Joaquin Preciado*, 167 Cal. 580, 140 P. 239 (1914). However, this authority is neither compelling nor recent. It is thus not established that plaintiffs would not be barred by the anti-injunction provisions cited should they seek an injunction in state court.

the claim in all of these cases; rather, plaintiffs are claiming that the very process of determining whether any tax is due at all results in a violation of their First Amendment rights. Such violation cannot be remedied by a return of the tax paid if the statute is eventually found to be unconstitutional in state court.

The distinction between a deprivation of property rights as opposed to personal liberty as a basis for granting injunctive relief is discussed in *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966), *cert. denied* 386 U.S. 1033 (1967). In that case, the court grappled with the problem of whether a claimed constitutional violation could in fact overcome "both the force of 28 U.S.C. § 1341 (as to federal injunctions against enforcement of state tax laws) and the reasons for federal restraint (as to federal declaratory judgments or judgments for tax refunds)." *Id.* at 174. The court concluded that if the alleged constitutional violation is of personal, rather than property rights, such as claim could prevail over the proscriptions of § 1341. *Id.* at 175.[13]

Even in a case where the harm to personal rights did not rise to the level of a First Amendment claim, it has been held that an injunction is appropriate where the process of collecting the tax would result in irreparable injury. In *United States Steel Corp. v. Multistate Tax Commission*, 367 F. Supp. 107 (S.D.N.Y. 1973), plaintiffs were required by a state taxing statute to turn over their books and records

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[13]In holding that injunctive relief should not be granted, the court noted that "[i]n the instant case, we have no claim of the denial of procedural due process. Plaintiffs do not complain of the method of assessing or collecting the tax. They complain of the tax itself." These plaintiffs complain both of the tax *and* the process. The court relied heavily in its analysis on a scholarly district court opinion, *Abernathy v. Carpenter*, 208 F. Supp. 793 (W.D. Mo. 1962), *aff'd per curiam*, 373 U.S. 241 (1963), which contains an excellent discussion of the concerns relevant to the granting of such an injunction.

to persons whose authority and qualifications they claimed were invalid. The court granted an injunction against the collection of the state tax, rejecting the proposition that the plaintiffs could pay the tax and sue for refund in state court. The court noted that this remedy had an infirmity since, "because it is unavailable to plaintiffs until after the audits have been conducted, it might cause plaintiffs irreparable injury . . . In cases where irreparable injury would occur if no injunction were to be granted, federal courts will entertain suit." *Id* at 116. As discussed above, a violation of the establishment clause constitutes irreparable injury, and this injury cannot be avoided without the issuance of an injunction against the collection of the tax.[14]

Furthermore, the granting of an injunction in this case would not be contrary to any of the policy considerations which underlie the anti-injunction statute. As stated in *Matthews v. Rodgers*, 284 U.S. 521 at 525 (1932):

> The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in very case where the asserted federal right may be preserved without it.

Here, the concern over federalism is not compelling since an interpretation of federal statute is being imposed by the Secretary upon the State. In fact, the State has represented

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[14]In a recent district court case, *Independent Baptist Church v. State of Tennessee*, No. 1-78-194 (D. Tenn., filed Nov. 21, 1978), involving identical issues, the court dismissed the action on the basis that the plaintiff's state remedy of suing for refund was adequate, even though no injunction was available in state court. The opinion states that "[t]he situation of the plaintiffs . . . does not appear substantially different from the situation of any other individual contending that a tax is unconstitutional." *Id.* at 5. However, the court did not address itself to the point raised here, that the collection procedure itself violates the constitution. Presumably, this argument was not raised before that court.

that it disagrees with the Secretary's interpretation and has itself petitioned this court to resolve the present dispute. It is difficult to characterize the posture of the State in the present litigation as in any sense "independent." Thus, the injunction, if granted, would not interfere with the State's autonomy.

C. Motion to Dismiss Cross-Claim

The State has cross-claimed against the Secretary challenging the constitutionality of the Directive. However, the State has available to it an administrative remedy by which it can raise such a challenge. This administrative procedure is detailed in 26 U.S.C. 3304(c), 3310. Since the State has not exhausted its administrative remedies, its cross-claim against the Secretary must be dismissed. *See McKart v. United States*, 395 U.S. 185, 193 (1969); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 36, 51 (1938).

III

Conclusion

The plaintiffs are entitled to a preliminary injunction against the State and the EDD to restrain collection of unemployment and disability tax[15] with respect to their employees. The Secretary has represented to this court that he will not decertify the State's program if the State is out of conformity due to an injunction issued by this court. Thus, no separate injunction is necessary as to him at this time.

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[15]Under *Cal. Unemp. Ins. Code* § 2606 (West 1972), covered services for disability insurance purposes are the same as covered services for unemployment insurance. The basis for granting injunctive relief against the collection of the disability tax is thus the same as for enjoining collection of the unemployment tax.

The motion of the Secretary to be dismissed for lack of standing is denied, however, the Secretary's motion to dismiss the State's cross-claim is granted.

DATED September 21, 1979.

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

APPENDIX E.

Supplemental Opinion.

United States District Court, Central District of California.

Grace Brethren Church and Reverend David L. Hocking, etc., et al, Plaintiffs, v. State of California, etc., et al., Defendants. Case No. CV 79-93 MRP.

The Lutheran Church-Missouri Synod, a non-profit membership corporation on behalf of 85 member Lutheran Churches, etc., et al., Plaintiffs, v. The State of California Employment Development Department, et al., Defendants. Case No. CV 79-162 MRP.

Filed: June 2, 1980.

The employees who perform services for the schools involved in these two cases fall into three categories:

Category 1: Those who are in the employ of a church or a convention or association of churches.

Category 2: Those who are in the employ of a separate corporation formed by a church or a convention or association of churches.

Category 3: Those who are in the employ of a corporation which is operated primarily for religious purposes, but which is not operated, supervised, controlled or principally supported by a church or convention or association of churches, i.e., an independent, non-church affiliated religious school.

On September 21, 1979, the Court granted the preliminary injunction sought by plaintiffs in both cases as to employees in the first category described above. After the Order Granting the Preliminary Injunction was entered, a Motion for Clarification was filed by defendants State of California,

Employment Development Department, and Martin Glick properly bringing to the Court's attention certain ambiguities in the opinion and questioning the reach of the preliminary injunction granted by the Court. At the hearing on the Motion for Clarification, the Court informed the parties that the preliminary injunction extended only to employees who performed services in schools which were not separately incorporated and who were therefore in the direct employ of a church or convention or association of churches. The Court then asked the parties to submit additional briefing on the issue of whether the injunction should be extended to cover the employees of the separately incorporated schools which are also the subject of these actions. That briefing having been completed, and the Court having heard argument on that issue, this opinion deals with the following remaining categories of employees:

Category 2: As stated above, this category includes those employees who are in the employ of a corporation formed by a church or a convention or association of churches. Corporations in this category operate the following schools:

> Cal Lutheran High School, in San Diego, California, incorporated under the name of Center for Lutheran Education.
>
> Good Shepherd Lutheran School, in Simi Valley, California, incorporated under the name of Good Shepherd Lutheran School.
>
> Los Angeles Lutheran High School, in Burbank, California, incorporated under the name of the Lutheran High School Association of Southern California.
>
> Lutheran High School La Verne, in La Verne, California, incorporated under the name of Faith Lutheran High School Association.
>
> The Lutheran School of the Foothills, in La Crescenta,

California, incorporated under the name of the Lutheran School of the Foothills, Inc.

Lutheran High School of Orange County, in Orange, California, incorporated under the name of the Lutheran High School Association of Orange County.

Covenant Lutheran School, in Los Angeles, California, incorporated under the name of Covenant Lutheran School Corporation.

It is clear that the employees of these schools could also be categorized as persons in the employ of an organization which is operated primarily for religious purposes and is operated, supervised, controlled and principally supported by a church. Indeed, as pointed out at Page 8 of the Court's initial Opinion in this matter, the legislative history of 26 U.S.C. § 3309(b)(1) indicates that it was intended that a distinction be made between religious school personnel who are in the direct employ of a church or convention or association of churches and religious school personnel who are in the employ of a separate corporation formed by a church or convention or association of churches. From the legislative history, it would seem that if a church or convention or association of churches chooses to operate a school directly with the school personnel as its own employees, its employees are intended to fall within § 3309(b)(1)(A), but if the church or convention or association of churches chooses to separately incorporate a school, the employees must meet the requirements of § 3309(b)(1)(B) if they are to be exempt. Although there may be a rational basis for this distinction when applied to the employees of a school incorporated by *one* church, there seems to be no basis for such a distinction in the case of a school operated by a convention or association of churches. Unlike the case of a school operated by one church, it is clear that if a convention or association of churches desires to operate a

single school, some legal entity would have to be formed for that purpose. Even though a corporate entity may be chosen in order to permit the churches to operate the school together, it is certainly arguable that the corporation's employees are actually in the employ of a convention or association of churches, and that the employees fall within § 3309(b)(1)(A).

Category 3: As stated above, this category includes those employees who are in the employ of a corporation which is operated primarily for religious purposes, but which is not operated, supervised, controlled or principally supported by a church or a convention or association of churches. Corporations in this category operate the following independent, non-church affiliated religious schools:

> Redwood Christian Schools, a corporation which is a community of four schools, with a central office at Castro Valley, California
>
> Christian Unified Schools of San Diego, a corporation which is a community of eight schools, with a central office at El Cajon, California

Obviously, the categorization of the schools is merely a preliminary step in determining the propriety of injunctive releif, and the Court now turns to that principal issue.

With respect to Category 2 above, it is clear that the statements in the Court's prior Opinion regarding the plain meaning of the statute apply somewhat differently but with equal force to these schools as well as to those which are not separately incorporated. The first six listed in this category are schools whose employees logically fall within the plain meaning of 26 U.S.C. § 3309(b)(1)(A) in that they are in the employ of a convention or association of churches and, in each case, a substantial number of the churches involved are members of The Lutheran Church-Missouri Synod. In addition, it is manifest that the same serious

constitutional objections to the Secretary of Labor's (herein "the Secretary") interpretation of the 1978 amendment of § 3309(b)(1) and the State's adoption of that interpretation with respect to § 634.5(a) of the California Unemployment Insurance Code exist with respect to these schools as exist in the case of the schools in Category 1 above.

The last school listed in Category 2 is operated as a separate corporation by one church which is a member of the Synod. As discussed above, the legislative history of § 3309(b)(1) would seem to indicate that the employees of this school fall within § 3309(b)(1)(B) rather than § 3309(b)(1)(A). Indeed, although the Court in the above discussion has treated the employees of the first six schools as being within § 3309(b)(1)(A), the legislative history may well require that all of the employees in this category be classified within § 3309(b)(1)(B) because of their separate incorporation.

To allow the issue of the propriety of injunctive relief to turn on the question of whether the schools are or are not separately incorporated obviously permits form to override substance. Nevertheless, if separate incorporation does result in the employees of the separately incorporated schools being classified as within § 3309(b)(1)(B) rather than § 3309(b)(1)(A), the determination of their exemption from the tax is made more complex. If the employees are in the direct employ of a church or a convention or association of churches, the only inquiry which is necessary is whether in fact the employer is such an entity. If it is, under the plain meaning of § 3309(b)(1)(A) and its counterpart, § 634.5(a)(1) of the California Unemployment Insurance Code, the employees are exempt. However, if the employees fall within § 3309(b)(1)(B), or its counterpart, § 634.5(a)(2), the requirement that the school be operated "primarily for religious purposes" *and* be "supervised,

controlled, or principally supported by a church or convention or association of churches'' must be satisfied. Thus, the State has argued that the burden is on the separately incorporated schools to furnish *some* information from which the State can determine that the school meets the statutory requirements of § 634.5(a)(2). There is no doubt that the State is correct in this contention as to schools which fall within § 634.5(a)(2), and it is also true that the determination of exemption as to these schools requires the State to engage in a more detailed inquiry than is required with respect to the employees of those schools which fall within § 634.5(a)(1).

Although the State appears to be mainly concerned that it receive adequate information on which to base a determination of exemption, the Secretary's position is wholly different. His position is that employees performing services in church-related schools are covered regardless of whether the school is an integral part of the church or separately incorporated, and regardless of whether the employee performs services directly for a church or a separate corporation. Under the Secretary's interpretation, only employees performing strictly church duties at the schools pursuant to their church responsibilities are exempt and a determination of the exempt and non-exempt services must be made for each pay period. The Secretary's test for exemption is not based on the identity of the employer but on the nature of the services performed by the employee during each pay period. Under this interpretation, the State is required to engage in constant monitoring of the activities of the employees of these schools to make the determination of exemption for each pay period. As the Court stated in its original Opinion, this monitoring and surveillance of the activities of the teachers in these religious schools impermissibly entangles the State in religious activities.

In the opinion of the Court, whether the employees of the schools in this category fall within § 3309(b)(1)(A) or (B), or the state counterpart of those subsections, § 634.5(a)(1) or (2), the State should be able to make a determination of exemption without the constant monitoring required by the Secretary's interpretation. In fact, if information such as that which has been given to this Court is given to the State, and that information is appropriately verified, the employees of these schools should be exempt. Further monitoring and inquiry of the type required by the Secretary's interpretation raises the same problems of unconstitutional entanglement as to the employees of these schools as it does with respect to the employees in Category 1. Thus, the preliminary injunction should be extended to the employees of schools in Category 2 as well.

As to the employees of the schools in Category 3, plaintiffs in the Grace Brethren case argue that since these schools are substantially identical in religious purpose and orientation to those in the other two categories, the employees of these schools should be treated identically with respect to exemption from the unemployment and disability tax. The difficulty with that argument is that, even assuming as a matter of fact that substantial similarity exists between the schools in this category and those in the other two, the legal analysis of the question of exemption of the employees of these schools is entirely different. Obviously, these employees do not fall within the plain meaning of the statute. Indeed, they are not covered by the statute at all. Thus, the claim that the imposition of the tax is unconstitutional in the case of the employees of the Category 3 schools does not arise out of the Secretary's interpretation of the statute or the process of inquiry required by that interpretation. Since no claim can be made that the statute covers these employees, it must be presumed that the Secretary would

have no reason to question how their time is spent. Whatever the employees of these schools may teach or do, they could not be exempt under this statute and any inquiry by the Secretary would therefore be pointless.

Thus, plaintiffs' contention that since the Court has concluded that a danger of unconstitutional entanglement exists with respect to the employees in Categories 1 and 2, it must also reach that conclusion with respect to those in Category 3 must be rejected. The argument of unconstitutional entanglement is far less compelling in the case of these schools than in the case of the schools in Categories 1 and 2. In fact, there would appear to be little active involvement of the state in religious activities resulting from the imposition of the tax with respect to these employees. The imposition of the tax may well be wrong on other grounds, but it does not entail the degree of danger of excessive entanglement found in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Further, the Court does not find the argument that the Free Exercise Clause is violated by the imposition of the tax to be compelling at all. That argument will require further development at the time of trial, but the evidence heretofore presented in support of this argument has not been convincing.

Finally, it is argued that to treat the non-church religious schools differently from the church affiliated religious schools would violate the Equal Protection Clause of the Fourteenth Amendment. This argument raises even more difficult questions than the other two and will also require additional briefing and development at the time of trial.

In sum, the Court finds merit in some of the arguments advanced by the plaintiffs in the Grace Brethren case regarding the schools in Category 3 but it does not find them sufficiently persuasive to require the extension of the in-

junction to the employees of these schools on the present state of the record.

The Court finds that as to the employees in Categories 1 and 2, plaintiffs in the two cases have satisfied both of the alternate tests for the propriety of injunctive relief set forth in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1976). With respect to the employees in Category 3, plaintiffs in the Grace Brethren case have satisfied neither of these tests, and even if the standards in *Inglis* are viewed as "merely extremes of a single continuum" (*Benda v. Grand Lodge of International Association of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978)), these plaintiffs have not demonstrated the degree of probability of success on the merits or the existence of sufficiently serious questions required to warrant the issuance of an injunction. Further, they have not shown that the balance of hardships tips significantly in their favor.

In accordance with this Supplemental Opinion, which shall constitute further Findings of Fact and Conclusions of Law in both cases, the preliminary injunction is granted with respect to the employees of the schools in Categories 1 and 2 and denied with respect to the employees of the schools in Category 3.

DATED: June 2, 1980.

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

APPENDIX F.

Order.

United States District Court, Central District of California.

Grace Brethren Church and Reverend David L. Hocking, etc., et al., Plaintiffs, v. State of California, etc., et al., Defendants. Case No. CV 79-93 MRP.

The Lutheran Church-Missouri Synod, a non-profit membership corporation on behalf of 85 member Lutheran Churches, etc., et al., Plaintifs, v. The State of California Employment Development Department, et al., Defendants. Case No. CV 79-162 MRP.

Filed: Sept. 21, 1979.

Based on the Findings of Fact and Conclusions of Law contained in the Opinion filed concurrently herewith,

IT IS ORDERED that,

1. Defendant State of California (herein "the State") and defendant Martin Glick, Director of the Employment Development Department of the State of California and their agents, employees, representatives, and all persons acting under, in concert with them or for them are hereby enjoined and restrained from attempting to collect from plaintiffs Grace Brethren Church and members of plaintiff The Lutheran Church-Missouri Synod unemployment insurance tax or disability tax or information relating to the collection of such taxes for or on account of those individuals who work at schools operated by said plaintiffs.

2. Plaintiff Grace Brethren Church shall post a bond in the amount of $1,000.00 and plaintiff Lutheran Church-Missouri Synod shall post a bond in the amount of $5,000.00.

3. The motion of the Secretary of Labor that he be dismissed as a defendant for lack of standing is denied.

4. The motion of the Secretary to dismiss the State's cross-claim for failure to exhaust administrative remedies is granted.

5. The Clerk of the Court shall serve a copy of this Judgment and the Opinion filed concurrently herewith on all of the parties to this action.

DATED: September 21, 1979.

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

APPENDIX G.

Order Granting Preliminary Injunction.

United States District Court, Central District of California.

Grace Brethren Church and Reverend David L. Hocking, etc., et al., Plaintiffs. v. State of California, etc., et al., Defendants. Case No. CV 79-93 MRP.

The Lutheran Church-Missouri Synod, a non-profit membership corporation on behalf of 85 member Lutheran Churches, etc., et al., Plaintiffs, v. The State of California Employment Development Department, et al., Defendants. Case No. CV 79-162 MRP.

Filed: June 2, 1980.

Based on the Findings of Fact and Conclusions of Law contained in the Supplemental Opinion filed concurrently herewith,

IT IS ORDERED that,

1. Defendant State of California (herein "the State") and defendant Martin Glick, Director of the Employment Development Department of the State of California and their agents, employees, representatives, and all persons acting under, in concert with them or for them are hereby enjoined and restrained from collecting or attempting to collect unemployment insurance tax or disability tax or further information relating to the collection of such taxes for or on account of those individuals who work at the following schools:

> Cal Lutheran High School, in San Diego, California, incorporated under the name of Center for Lutheran Education.
>
> Good Shepherd Lutheran School, in Simi Valley, California, incorporated under the name of Good Shepherd Lutheran School

Los Angeles Lutheran High School, in Burbank, California, incorporated under the name of the Lutheran High School Association of Southern California

Lutheran High School La Verne, in La Verne, California, incorporated under the name of Faith Lutheran High School Association

The Lutheran School of the Foothills, in La Crescenta, California, incorporated under the name of the Lutheran School of the Foothills, Inc.

Lutheran High School of Orange County, in Orange, California, incorporated under the name of the Lutheran High School Association of Orange County

Covenant Lutheran School, in Los Angeles, California, incorporated under the name of Covenant Lutheran School Corporation

2. Plaintiff Grace Brethren church has heretofore posted a bond in the amount of $1,000.00 and plaintiff Lutheran Church-Missouri Synod has heretofore posted a bond in the amount of $5,000.00. By stipulation of the parties to both actions, those bonds shall satisfy the requirement of security pursuant to Fed.R.Civ.P. 65(c).

3. The Clerk of the Court shall serve a copy of this Order and the Supplemental Opinion filed concurrently herewith on all of the parties to this action.

DATED: June 2, 1980.

/s/ Mariana R. Pfaelzer
Mariana R. Pfaelzer
United States District Judge

APPENDIX H.

Notice of Appeal to the Supreme Court of the United States.

United States District Court, Central District of California.

Grace Brethren Church and Reverend David L. Hocking, etc., et al., Plaintiffs, v. State of California, etc., et al., Defendants. No. CV 79-093-MRP.

The Lutheran Church-Missouri Synod, a non-profit membership corporation on behalf of 85 member Lutheran Churches, etc., et al., Plaintiffs, v. The State of California Employment Development Department, et al., Defendants. No. CV 79-162-MRP.

Filed: May 6, 1981.

NOTICE IS HEREBY GIVEN that defendants State of California, State of California Employment Development Department and the Director of the State of California Employment Development Department hereby appeal to the Supreme Court of the United States from the part of the final judgment entered in this action on April 6, 1981, which holds that 26 U.S.C. § 3309(b)(1) and California Unem-

ployment Insurance Code § 634.5(a) are unconstitutional as interpreted and applied.

This appeal is taken pursuant to 28 U.S.C. § 1252.

DATED: This 6th day of May, 1981.

GEORGE DEUKMEJIAN,
Attorney General
EDMOND B. MAMER,
LAWRENCE K. KEETHE,
JEFFREY M. VESELY,
Deputy Attorneys General
By /s/ Jeffrey M. Vesely
JEFFREY M. VESELY
Attorneys for Defendants
State of California,
State of California Employment
Development Department, and The
Director of the State of California
Employment Development Department

AFFIDAVIT OF SERVICE BY MAIL

State of California, County of Los Angeles—ss.

I, CATHERINE A. METRAKOS, being first duly sworn on oath deposes and states:

I am over 18 years of age, and not a party to the within cause; my business address is 800 Tishman Building, 3580 Wilshire Boulevard, Los Angeles, California 90010; I served a copy of the attached NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on each of the following, by placing same in an envelope(s) addressed as follows:

SEE ATTACHED LIST:

Each said envelope was then, on May 6, 1981, sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

/s/ CATHERINE A. METRAKOS
Affiant
Catherine A. Metrakos

Subscribed and sworn to before me
this 6th Day of May, 1981.
/s/ JULIA M. ANDERSON
Notary Public in and for said
County and State
[SEAL]

AFFIDAVIT OF SERVICE BY MAIL — ATTACHMENT: May 6, 1981

William Bentley Ball, Esq.
BALL & SKELLY
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CALDWELL & TOMS
611 West Sixth St.
Suite 1890
Los Angeles, CA 90017

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

These above parties are all of the parties required to be served.

APPENDIX I.

Notice of Appeal to the Supreme Court of the United States.

United States District Court, Central District of California.

Grace Brethren Church and Reverend David L. Hocking, etc., et al., Plaintiffs, v. State of California, etc., et al., Defendants. No. CV 79-093-MRP.

The Lutheran Church-Missouri Synod, a non-profit membership corporation on behalf of 85 member Lutheran Churches, etc., et al., Plaintiffs, v. The State of California Employment Development Department, et al., Defendants. No. CV 79-162-MRP.

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NOTICE IS HEREBY GIVEN that defendants State of California, State of California Employment Development Department and the Director of the State of California Employment Development Department hereby appeal to the Supreme Court of the United States from the part of the final judgment entered in this action on April 6, 1981, which holds that 26 U.S.C. § 3309(b)(1) and California Unem-

ployment Insurance Code § 634.5(a) are unconstitutional as interpreted and applied.

This appeal is taken pursuant to 28 U.S.C. § 1252.

DATED: This 6th day of May, 1981.

GEORGE DEUKMEJIAN,
Attorney General
EDMOND B. MAMER,
LAWRENCE K. KEETHE,
JEFFREY M. VESELY,
Deputy Attorneys General
By /s/ Jeffrey M. Vesely
JEFFREY M. VESELY
Attorneys for Defendants
State of California,
State of California Employment
Development Department, and The
Director of the State of California
Employment Development Department

AFFIDAVIT OF SERVICE BY MAIL

State of California, County of Los Angeles—ss.

I, CATHERINE A. METRAKOS, being first duly sworn on oath deposes and states:

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SEE ATTACHED LIST:

Each said envelope was then, on May 6, 1981, sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with the postage thereon fully prepaid.

/s/ Catherine A. Metrakos
Affiant
Catherine A. Metrakos

Subscribed and sworn to before me this 6th day of May, 1981.

/s/ Julia M. Anderson,
Notary Public in and for said County and State

AFFIDAVIT OF SERVICE BY MAIL — ATTACHMENT: May 6, 1981

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Department of Justice
Washington, D.C. 20530

These above parties are all of the parties required to be served.

APPENDIX J.

U.S. DEPARTMENT OF LABOR
Employment and Training Administration
Washington, D.C. 20213
Date: May 30, 1978

DIRECTIVE: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 39-78

TO: ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM: LAWRENCE W. ROGERS
Administrator
Field Operations

SUBJECT: Unemployment Insurance Coverage of Employees of Church-Related Nonprofit Elementary and Secondary Schools

1. *Purpose.* to inform SESAs of the following Secretary of Labor's decision concerning unemployment insurance coverage of employees of church-related nonprofit elementary and secondary schools: By repealing the former exclusion in section 3309(b)(3) of the Federal Unemployment Tax Act (FUTA) relating to services for education institutions, Congress clearly intended to extend coverage to services for church-related schools.

2. *References.* Sections 3304(a)(6) and 3309(a) and (b), FUTA, as enacted by Public Law 91-373 and amended by Public Law 94-566.

3. *Background.* In 1970, Congress extended unemployment insurance coverage to services for nonprofit organizations (and State hospitals and institutions of higher education) by requiring that State UI laws cover these services effective January 1, 1972, as a condition for Federal certification of the State law for tax credit (Public Law

91-373). States were, however, permitted to exclude certain services from coverage, including the following services described in section 3309(b), FUTA, performed:

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> "(3) in the employ of a school which is not an institution of higher education."

The 1976 amendments (Public Law 94-566) required, as a condition for tax credit, that States extend coverage, effective January 1, 1978, to most State and local government workers. Although retaining the limited exclusions under paragraphs (1) and (2) above, the Congress deleted the exclusion under paragraph (3) relating to elementary and secondary schools. The question posed was whether their exclusion is permitted pursuant to paragraph (1); paragraph (2) is not at issue.

Several different church groups challenged coverage of a variety of church-related elementary and secondary schools resulting from the repeal of the exemption contained in paragraph (3) basing their position on the alleged applicability of paragraph (1).

4. *Secretary's Decision.* Secretary Marshall's decision concerning unemployment insurance coverage of services performed for church-related schools was announced April 18, 1978, in a letter of that date to the Most Reverend Thomas C. Kelley, O.P., General Secretary, United States

Catholic Conference. Secretary Marshall advised that repeal by Congress of the exclusion in section 3309(b)(3), FUTA, formerly exempting employees of a school which is not an institution of higher education, was clearly intended to result in State coverage of church-related elementary and secondary schools.

The only services performed in church-related elementary and secondary schools recognized as being within the scope of the exclusion permitted by section 3309(b)(1), FUTA, (and aside from the permitted (b)(2) exclusions) are those strictly church duties performed by church employees at the schools pursuant to their church responsibilities. The exclusion in section 3309(b)(1)(A) relating to church employees has no other application to activities performed in elementary and secondary schools since the schools are not churches within the meaning of that section. The exclusion contained in section 3309(b)(1)(B) applies only to services performed for organizations, other than educational institutions, that are church operated, supervised, controlled, or principally supported and whose employees are primarily engaged in religious activities. Subsection (b)(1)(B) does not apply to institutions where the employees of the institution are primarily engaged in educational activities at the elementary and secondary school level.

These conclusions, which are neutral as between schools operated by religious or secular organizations, give effect to the congressional purpose of extending unemployment insurance protection to virtually all employees. Thus, practically all of the estimated 242,000 employees of non-public elementary and secondary schools are covered; approximately 85 percent of the 242,000 are employees of church-related schools. Further, these conclusions are consistent with the well-established legal doctrine that exemptions from remedial statutes are to be narrowly construed and

their application limited to those establishments plainly and unmistakably within their terms and spirit.

If an employee performs both non-exempt and exempt services during a single employment period, as in the case of services performed for a church-related school and an organization exempted by section 3309(b)(1), and "if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employees for such period shall be deemed to be employment, but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment," as provided in section 3306(d), FUTA.

5. *Action Required.* All SESA's, except Kentucky for which coverage is deferred by Federal law until January 1, 1979, should inform all nonprofit elementary and secondary schools that services performed in their employ on and after January 1, 1978, are covered, with the limited exceptions specified above. All such employing units which are nonprofit institutions required to be covered should also be advised of their right to elect either the reimbursement or the contribution method of financing benefit costs. The election should be effective January 1, 1978.

If a State has enacted a transition provision authorized by section 121 of P.L. 94-566, previously exempt services for such schools are usable to establish a claim for benefits similar to other previously exempt services. Benefits based upon wages paid for previously exempt services may be non-charged as provided in ETA Handbook No. 364, issued September 2, 1977.

States that have held in abeyance or denied claims of employees of nonprofit schools should proceed to process or redetermine those claims. If claims have been established and monetarily determined without the use of wages earned in the employ of nonprofit schools, those claims should be redetermined. All SESA's should report within 30 days of the date of this letter to their respective Regional Offices of the actions they have taken or intend to take with respect to coverage of services in nonprofit schools below the level of institutions of higher education, and treatment of individuals whose claims were filed after December 31, 1977, and whose base period services consisted, in whole or in part, of services in such schools.

Those States which must take legislative or other action in order to implement the coverage requirements prescribed above should report to the Regional Office what actions they intend to take as well as inform them of the effective date of such actions.

6. *Inquiries.* Questions concerning this program letter should be directed to the appropriate Regional Office.

APPENDIX K.

Title 22 California Administrative Code Section 1256-36(b)(1)

1256-36. Discharge for Misconduct—Insubordination.

(a) This section relates to discharge from the most recent work for misconduct due to insubordination. Section 1256-30 of these regulations sets forth general principles also applicable under this section.

(b) Implicit in the agreement of hire is the concept that an employee is subject to some degree of authority exercised by the employer or the employer's representative. An employee is insubordinate if he or she intentionally disregards the employer's interest and wilfully violates the standard of behavior which the employer may rightfully expect of employees in any of the following ways:

(1) Refuses, without justification, to comply with the lawful and reasonable orders of the employer or the employer's representative. Compliance is not required in the following circumstances:

(A) The order is unreasonable because compliance is impossible for the employee due to reasons such as physical limitations which are peculiar to him or her and, if the reasons are not apparent, are made known to the employer or the employer's representative.

(B) The order is unreasonable because compliance would impose a new and unreasonable burden on the employee.

(C) The order is unreasonable because it does not relate to or affect the employer's business interests.

(D) The employee reasonably and in good faith believes compliance would result in a violation of the law, objects or makes a reasonable effort to object to the employer, and the employer makes no reasonable effort to explain the basis

for the order to the employee. Whether compliance with the order would be a violation of the law is not determinative.

(E) The employee reasonably believes compliance with the order would cause an undue risk of injury or illness (see Section 1256-15 of these regulations).

(F) The employee has a reasonable and good-faith doubt of the authority of the individual issuing the order.

Office - Supreme Court, U.S.
FILED
JAN 14 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-31, 81-228 and 81-455

In the Supreme Court of the United States

OCTOBER TERM, 1981

CALIFORNIA, ET AL.,

Appellants

v.

GRACE BRETHREN CHURCH, ET AL.

UNITED STATES, ET AL.,

Appellants

v.

GRACE BRETHREN CHURCH, ET AL.

GRACE BRETHREN CHURCH, ET AL.

v.

UNITED STATES, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOINT APPENDIX

JURISDICTIONAL STATEMENTS FILED JULY 8, 1981,
AUGUST 3, 1981 AND SEPTEMBER 1, 1981
JURISDICTION POSTPONED TO HEARING ON THE MERITS
NOVEMBER 2, 1981

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL DOCKET

Date	Nr.	Proceedings
1-8-79	kp	1. Fld cplt. Issd sums. Case may be referred to Mag. Kronenberg
1/23/79	rlb	2. Fld USM's srv of process rtnd srvd 1/15/79 on F. Ray Marshall; State of Calif and Martin R. Glick on 1/16/79.
2/2/79	rlb	3. Fld State defts' ANSWER to COMPLAINT & CROSS-CLAIM. Issd summs.
*1/31/79	rlb	4. Fld sep summs, (Govt) rtnd srvd 1/16/79 on Dept of Labor.
2/13/79	rlb	5. Fld app for & ORD allowing Phillip J. Murren to appear & naming Robert L. Toms as local cnsl.
		6. Fld app for & ORD allowing William B. Ball to appeal as nonresident atty & naming Robert L. Toms as local cnsl.
2/16/79	rlb	7. Fld plfs' ntc of mot & mot, rtnble 3/19/79, 9:30am, for prlm inj.
		8. Fld plf's memo in suppt of P/As in suppt mot for prlm inj.
		LODGED proposed OSC re prelm inj.
2/27/79	rlb	9. Fld summs on x-clm rtnd srvd 2/15/79.
3/5/79	rlb	LODGED plfs' proposed ord, inj.
3/6/79	rlb	10. Fld OSC, rtnble 3/29/79, 1:30pm re prlm inj.
3/8/79	rlb	11. Fld defts' ntc of mot & mot, rtnble 3/29/79, 1:30pm, for dsml.

Date	Nr.	Proceedings
		12. Fld plfts' amnd ntc of mot & mot, rtnble 3/29/79, 1:30pm forprlm inj.
		13. Fld plfs' proof of srv by mail of memo of P/AS.
		14. Fld plfs' proof of srv of OSC re prlm inj.
		15. Fld stip & ORD thereon contg all P/T mots to 3/29/79, 1:30pm.
3/9/79	rlb	LODGED defts' proposed ord dsmg plf's cmplt.
*3/8/79	rlb	16. Fld Fed deft's memo of P/As in suppt Mot to dsm.
3/15/79	rlb	17. Fld defts Department's memo of P/As in opp to mot to dsm.
		18. Fld defts Department's memo of P/As in opp to mot for prlm inj.
3/19/79	rlb	19. Fld Fed deft's memo of P/As in opp to plfs' mot for prlm inj.
3/20/79	rlb	20. Fld stip & ORD thereon that Fed deft's mot to dsm be hrd 3/29/79, 1:30pm; plf opp papers be fld on or bf 3/23/79 & reply 3/27/79.
3/26/79	rlb	21. Fld dclrtn of Royer in suppt plfs' mot for prlm inj.
		22. Fld dclrtn of Sidney & Patricia Bowen in suppt plfs' mot for prlm inj.
		23. Fld plfs' erata sheet & suppl memo of P/As in suppt of mot for prlm inj.
		24. Fld plfs' dclrtn of Rev. Hocking in suppt plfs' mot for prlm inj.
		25. Fld plfs' memo of P/As in opp Fed defts' mot to dsm.

Date	Nr.	Proceedings
3/29/79	jld	26. Fld dft Dept of Labor memo P/A in suprt of fed dft mtn to dism cross-claim Stmnt of Case.
3/29/79	jld	27. Min/Ord—Mtn of plntf for prelim injunct are ord cont to 3/30/79, 9:00 AM.
3/30/79	jld	28. Min/Ord—Mtn of defts to dism; mtn of plntf for prelim injunct; & mtn of gov dfts to dism State of CA X-claim tkn under submission.
*3/29/79	rlb	29. Fld defts ntc of mot & mot, rtnble 3/30/79 at 9am
5/4/79	rlb	30. Fld State defts suppl memo of P/AS in opp to mot for prlm inj.
		31. Fld dclrtn of Bratt.
5/11/79	rlb	32. Fld Fed deft's suppl memo.
5/18/79	rlb	33. Fld plfs' memo of P/As on adm entanglements
		34. thru 40. Fld (7 separate) dclrtns of Helen E. Radawski; Dean A. Ohlman; Mildred Feit; Robin Marshall; Eloise Brown; Dr. Reuben Sequeira; J. Thomas Cook.
5/23/79	rlb	35. MIN ORD: Cnsl mk fur argument on previously sub mots: Mots Remain under Submission.
6/1/79	rlb	36. Fld State defts' opp to Fed defts' mot to dsm x-clm.
9/21/79	rlb	37. Fld ORD that defts State & Martin Glick are enjoined frm collecting unemployment ins tax frm plfs Grace Brethern Church and plf The Lutheran Church-Missouri Synod; that plf Grace

Date	Nr.	Proceedings
		Brethern post bond In sun of $1,000.00 & plf Luthern Church—Missouri Synod post bond in sum of $5,000.00; Mot of Sec of Labor to be dsmd is Denied; Mot of Sec to dsm State's x-clm is Granted. (Ent 9/25/79 m/cpys ntfd prtys)
	38.	Fld OPINION.
	39.	Fld stip & ORD that the amt of bond on inj be $1,000.00.
10-15-79	mn	40. Fld defts notc of motn & motn for clarifcatn retble 11-19-79, 9:30 AM.
	41.	Fld defts argument in support of motn for clarificatn.
10/25/79	rlb	42. Fld plfs' Document Of Title of $1,000.00. Deposited into Registry of Court.
11/5/79	rlb	43. Fld stip & ORD contg mot for clarification to 12/3/79. 9:30am.
11/19/79	fb	44. Fld deft's USA, Sec Of Labor NOTICE OF APPEAL to the 9th Cir. C/A fr ord ent on 9/25/79.
11/21/79	rlb	45. Fld plfs' resp to mot for clarification.
11/27/79	rlb	46. Fld Federal defts' designation of reporters' transcript of prcdngs.
11/29/79	rlb	47. Fld stip & ORD that plfs rsp papers to State Deft's mot for clarification will be fld 11/21/79.
11-30-79	lw	48. Fld State defts' NOTC OF APPEAL to 9th Cir C/A frm Ord ent 9-25-79. 70.00 fldng & docket fees pd.
11/29/79	fb	Fld orig of Reptr's transc of prcdgs had on 3/29/79 & 3/30/79 Vol 1; 52/23/79 Vol 2.

Date	Nr.		Proceedings
12/3/79	rlb	49.	MIN ORD: HRG State of Calif's mot for clarification: Crt states no inj issd agnst Fed defts; Fur hrg contd to 1/28/80, 11am
12/13/79	nm	50.	Fld Stip & ORD re hrg on prelim inj set on cal 1/28/80 11am., & briefing schedule.
12/24/79	rlb	51.	Fld State & Martin Glick's ntc Of non designation of reporter's transcript of prcdngs.
12/26/79	nm	52.	Fld Federal Deft's declar to Joseph A. Hickey.
		53.	Fld Pltf's Lutheran Church's declar of C. Schlimpert, L. Schulz, W. Hampton, A. Baumgartel, R. Dueker, D. Schulteis & N. Young.
12/21/79	nm	54.	Fld Stip re # of separately inc scholls.
		55.	Fld Pltfs' declar of August C. Enderlin.
12/28/79	cm	56.	Fld Stip & ORD(MRP) ext ti to fle declaratns to 12/28/79.
		57.	Fld pltf's declaratn of W.G. Kelly.
1/2/80	cm	58.	Fld dft's 2nd supmntl memo.
1/4/80	rlb	59.	Fld plfs' opening brief on issue of status of non-church religious schools
		60.	Fld plfs' memo of P/As in suppt of prlm inj.
		61.	Fld State defts opening brief in opp to prln inj.
1/8/80	rlb	62.	Fld plfs Lutheran Church's proof of srv of memo of P/As etc.
1/15/80	rlb	63.	Fld plfs' 2nd memo of P/As in suppt prlm inj re sep Inc. Schools.

Date	Nr.		Proceedings
*1/10/80	rlb	64.	Fld plfs' ntc of attys chng of address & telephone #.
1/17/80	rlb	65.	Fld plf Lutheran Church's proof of srv of 2nd memo of P/As, etc.
1/28/80	rlb	66.	MIN ORD: HRG State of Ca. mot for clarification prlm Inj: Crt tks mot under Submission.
5/6/80	rlb	67.	MIN ORD: Crt's ruling on prlm inj: ORD prlm inj Granted in part & Denied in part; Cnsl to ntfy clk as to setting of stat conf; Ord bond to stand; Crt to prep ord On prlmn inj.
5/23/80	rlb	68.	MIN ORD: Crt sets stat conf for 5/30/80, 9:30am.
5/30/80	rlb	69.	MIN ORD: Stat Conf: Sets P/T for dt of C/T on 7/23/80, 9:30am.
6/2/80	rlb	70.	Fld ORD Granting prlm inj.
		71.	Fld Crt's supplemental Opinion.
7-1-80	lf	72.	Fld Stip & ORD that trial is set for 8-12-80, memo of contentns of fact & law due 7-28-80; prop PTC ord due 8-6-80
7-28-80	sb	73.	Fld pltf's memo of contention of facts & law
		74.	Fld memo of contention on facts & law of deft's State of Ca Employment Devel & Marvin Glick
		75.	Fld pltf's Lutheran Chruch Missouri Synod et al memo of contention of facts & law
		76.	Fld Federal deft memo of contention of facts & law

Date	Nr.	Proceedings
8/4/80	rlb	77. MIN ORD: Hrg flng & sprdng jdgmt frm USCCA dsmg appeal: ORD Mandate fld & sprd; Fld cc jdgmt USCCA dsmg appeal upon stip. (Ent 8/6/80)
8/7/80	rz	LODGED pltfs PTC ord retnbl 8/12/80, 9:30 AM
8/8/80	rz	78. Fld attys fr State of CA Employment Department & Martin Glick note of mot; mot fr ord establishg class actn; memo of P/A in suppt thereof; aff of Paul Cunningham; aff of Donald Louie; aff of James M. Bratt set fr 9/8/80, 9:30AM
	rz	79. Fld attys fr State of CA Employment Development Department & Martin Glick obj of State of CA Employment Development Department & Martin Glick to PTC ord in #CV-79-162-MRP
8/12/80	rz	80. Fld pltfs suppl list of exhs
	rz	81. Fld pltfs amendmnt to PTC ORD set fr 8/12/80, 9:30AM
8/13/80	rz	81. Fld stip & ORD re PTC set fr 8/12/80, 9:30AM
*8/12/80	rz	82. Fld pltfs PTC ORD retnbl 8/12/80, 9:30AM
*7/28/80	rz	83. Fld letter from Harry Sheinfeld re obj to admission at trial of certain material previously presented to the crt by pltfs
8-14-80	sb	84. MIN ORD: fur C/T (3rd day) cnsl argue cnsl stip to breifing schedule at which ti the amtter will be tkn under submission
*8-13-80	sb	85. MINORD: Fur C/T to cont on 8-14-80 9:30pm

Date	Nr.		Proceedings
*8-12-80	sb	86.	MIN ORD: P/T C/T 1st day comt 8-13-80 9:30am
8/14/80	rz	87.	Recvd fm 9th C/A cpy of ord that appeals are dismd.
8/29/80	rz	88.	Fld stip & ORD ext ti re briefing schedule to 10/22/80
9/2/80	rlb	89.	Fld Fed defts' memo of P/As In opp to mot for estb of class action.
9/8/80	rz	90.	MIN ORD: Hrg & crt DENIES mot fr ord establishing class actn
10/23/80	rlb	91.	Fld stip re briefing schedule & ORD thereon.
10/31/80	rlb	92.	Fld plfs, post trial brief.
		93.	Fld Plfs' trial brief incld proposed finds of fact
		94.	Fld Fed defts' post trial brief.
		95.	Fld trial brief of State defts.
11/7/80	rlb	96.	Fld plfs' reply trial brief.
11/28/80	rlb	97.	Fld Crt's ntc to cnsl that its special rules to be cancelled effective 11/1/80.
12/9/80	rlb	98.	Fld dclrtn of Enderlin.
		99.	Fld plfs' ntc of mot & mot, rtnbl 1/5/81, 10am, to expedite; memo of P/As.
12/12/80	rlb	100.	Fld plfs' suppl dclrtn of Enderlin in suppt mot to expedite.
12/18/80	rlb	101.	Fld State defts' resp to plfs' mot to expedite.
1/5/81	rlb	102.	MIN ORD: Hrg plf's mot to expedite: Crt states to cnsl that the opinion will fld on or bf 2/15/81.

Date	Nr.		Proceedings
1/7/81	rlb	103.	Fld plfs' ntc of ruling on plf's mot.
2/17/81	lp	104.	MIN ORD: On crt's own mot mat is set for 2/20/81 at 1pm for a stat conf & rulng by crt.
2/19/81	lp	105.	Fld notc of cont on crt's own mot stat conf & rulng by crt sched on cal for 2/20/81 has been cont to 3/9/81 at 1:30pm for hrng.
3/9/81	lp	106.	MIN ORD: Crt states rulng on injunctn to consl. crt to prepar ord on or b/f 3/11/81.
4/3/81	lp	107.	Fld Judgmnt & ORD that defts, agents, etc are permanently enjoined & restrained fr collectng, etc., as stated in ORD as to defts State of CA, the CA Unemployment Development Dept & its Director. that defts USA, US Dept of Labor, US Secretary of Labor, agents., etc., are enjoined & restrained fr interpreting in a manner wh requires state unemployment compensation plan administrators to collect contributions on behalf of employees of church-affiliated schools who fial to prov that they spend more than 50% of their time performing strictly church duties, & fr forcing or attempting to force any other persons to adopt such an interpretation. that judgment is entered in faovr of pltf. (ENT 4/6/81) Mld cpys. Mld note ptys. MD JS-6.
4/3/81	lp	108.	Fld second supplemental opinion.
4/16/81	lp	109.	Fld Bill of Cost, retrnbl on 4/22/81 at 1:30pm. Fld pltf Bill of Costs in amt of $68.00.

Date	Nr.		Proceedings
4/29/81	mp	110.	Fld Deft's NOTC OF APPEAL to the SUPREME COURT frm Jdgmt ent 4-6-81
5/6/81	lw	111.	Fld State of Calif.'s NOTC OF APPEAL to the SUPREME COURT frm Jdgmt ent 4-6-81
5/5/81	lp		LODGED pltf proposed ord re bond.
5/11/81	lp		LODGED pltf proposed ord re bond.
5/6/81	lp	112.	Fld ORD that the $1,000.00 bond is exonerated. FUR ORD that $1,000.00 deposited with the clerk of crt by pltf, Grace Brethren Church, be retrnd to pltf, forthwith, payable to "Caldwell & Toms Trust Account.
5-15-81	cw		Per order of court disb the sum of $1,000.00 to Caldwell & Toms.
6/1/81	am	113.	Fld deft's NOTC OF APPEAL in 9th Cir C/A frm Jdgmt ent 4/6/81.
6/5/81	am	114.	Fld deft's NOTC OF APPEAL in 9th Cir C/A frm Jdgmt ent 4/6/81. $70.00 fing & docket fees pd.
7/27/81	sb	115.	Lodged cpy fr USC/A 9th Circuit Ord appellant motn fr stay of proceeding is grantes & all proceeding on this appeal before it fr 6mon whichever come first

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 79-0093 MKP (KX)

GRACE BRETHREN CHURCH and REVEREND DAVID L. HOCKING, its Pastor; CALVARY CROSS CHURCH OF THE HIGHLANDS and REVEREND DONALD B. SHELEY, its Pastor; SCOTT MEMORIAL BAPTIST CHURCH and REVEREND TIM LAHAYE, its Pastor; CHRISTIAN UNIFIED SCHOOLS OF SAN DIEGO; REDWOOD CHRISTIAN SCHOOLS; SIDNEY BOWEN and PATRICIA BOWEN, his wife; PETER FARRELLY and SUE FARRELLY, his wife; WILLIAM TSCHANTZ and JANET TSCHANTZ, his wife; ARTHUR BRANDWOOD and CHERYL BRANDWOOD, his wife; STANLEY EDINGTON; R. FLORENCE MURTI; and R. SUZANNE ROYER, PLAINTIFFS

v.

STATE OF CALIFORNIA, acting through the EMPLOYMENT DEVELOPMENT DEPARTMENT; The Honorable MARTIN R. GLICK, Director of Employment Development; UNITED STATES OF AMERICA, acting through the UNITED STATES DEPARTMENT OF LABOR; and The Honorable F. RAY MARSHALL, United States Secretary of Labor, DEFENDANTS

COMPLAINT FOR DECLARATORY RELIEF AND FOR PRELIMINARY AND PERMANENT INJUNCTIONS

Filed Jan. 8, 1979

STATEMENT AS TO JURISDICTION

1. This is a civil action seeking declaratory, injunctive and other equitable relief. Plaintiffs seek an injunction against the deprivation under the color of the laws of the United States and of the State of California, of rights guaranteed to them by the Constitution of the United States. The action is brought under 28 U.S.C. §§ 1331, 1343 and 1346; 42 U.S.C. § 1983; 28 U.S.C. § 2201 and 2202. The matter in controversy exceeds the sum of $10,000, exclusive of interest and costs. This action seeks (a) a declaratory judgment declaring that the interpretation by the defendant Secretary of Labor of the United States of Section 3309(b)(1) of the Federal Unemployment Tax Act and by the defendant Director of Employment Development, State of California, of Section 634.5 of the California Unemployment Insurance Code, and the resultant application of these coordinate interpretations to plaintiffs so as to impose unemployment taxes upon them and to involve government excessively in the mission of churches, are violative of rights of the plaintiffs protected by the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States, (b) an injunction to restrain the defendant State of California from applying the aforesaid Section 634.5 of the California Unemployment Insurance Code to the plaintiffs. For the convenience of the Court, said statutes are summarized in Paragraphs 25-27 of this Complaint.

PLAINTIFFS

The Church and Pastor Plaintiffs

2. The plaintiff Reverend David L. Hocking, is the pastor of Grace Brethren Church of Long Beach, Long

Beach, California. He is a citizen of the United States, a resident of the State of California and a taxpayer. Grace Brethren Church is an independent, fundamental Bible-believing-and-teaching church, an integral part of the ministry of which consists of four Grace Christian Schools, all located in California.

3. The plaintiff Reverend Donald B. Sheley, is the pastor of Calvary Cross Church of the Highlands, San Bruno, California. He is a citizen of the United States, a resident of the State of California and a taxpayer. Calvary Cross Church of the Highlands is an independent, fundamental, Bible-believing-and-teaching church, an integral part of whose ministry is Highlands Academy, located at San Bruno, California.

4. The plaintiff Reverend Tim LaHaye, is the pastor of Scott Memorial Baptist Church, San Diego, California. He is a citizen of the United States, a resident of the State of California and a taxpayer. Scott Memorial Baptist Church is an independent, fundamental, Bible-believing-and-teaching church which has as one of its integrated ministries, the Christian Unified Schools of San Diego, located in California.

5. Each of the pastor plaintiffs is a "born again" Christian and an ordained minister of the Gospel who, as the pastor of a church, is charged with the duty to bear witness to the Lord and to further the religious mission of that church through the establishing and maintaining of a religious school.

6. Each of the churches and schools is supported solely out of the free will offerings of its religious supporters and receives no local, state or federal tax support.

7. Plaintiff Christian Unified Schools of San Diego, with a central office at El Cajon, California, is a community of five fundamental, Bible-believing-and-teaching schools located in California. These schools were founded and are operated for the promoting of the Christian religion.

8. Plaintiff Redwood Christian Schools, with a central office at Castro Valley, California, is a community of four fundamental, Bible-believing-and-teaching schools located in California. These schools were founded and are operated for the promoting of the Christian religion.

The Parent Plaintiffs

9. Plaintiffs Sidney Bowen and Patricia Bowen, his wife, reside at Compton, California. They are taxpayers, citizens of the United States and residents of the State of California. They are the parents of Sidney T. Bowen, age 14, Sharon Bowen, age 11, and James Bowen, age 10, all of whom are enrolled as students in Grace Christian Schools.

10. Plaintiffs Peter Farrelly and Sue Farrelly, his wife, reside at Pacifica, California. They are taxpayers, citizens of the United States, and residents of the State of California. They are the parents of Daniel, age 13, and Ellyn, age 6, both of whom are enrolled as students in Highlands Academy.

11. Plaintiffs William Tschantz and Janet Tschantz, his wife, reside at La Mesa, California. They are taxpayers, citizens of the United States, and residents of the State of California. They are the parents of Kimberly Tschantz, age 16, Kelly Tschantz, age 14, Robert Tschantz, age 10, and Christina Tschantz, age 6, all of whom are enrolled as students in schools of Christian Unified Schools of San Diego.

12. Plaintiffs Arthur Brandwood and Cheryl Brandwood, his wife, reside at Hayward, California. They are taxpayers, citizens of the United States and residents of the State of California. They are parents of Randolph, age 8, and Arthur, age 10, both of whom are enrolled in Redwood Christian Schools.

13. The parent plaintiffs are "born again" Christians who, on account of that fact, believe that they have the duty to rear their children to know the teachings of the

Bible as the infallible word of God, and to follow Jesus Christ as their personal Savior in their daily lives.

14. The parent plaintiffs therefore believe that they have the duty in conscience to select for their children the form of education offered at the schools wherein their aforesaid children now are enrolled.

The Teacher Plaintiffs

15. The plaintiff Stanley Edington resides at San Lorenzo, California. He is a full-time teacher at Redwood Christian Schools.

16. The plaintiff R. Florence Murti resides at Daly City, California. She is a full-time teacher at Highlands Academy.

17. The plaintiff R. Suzanne Royer resides at Long Beach, California. She is a full-time teacher in Grace Christian Schools.

18. The teacher plaintiffs R. Florence Murti and R. Suzanne Royer are persons in the employ of a church and of an organization which is operated solely for religious purposes, which organization is operated, supervised, controlled and entirely supported by a church. The teacher plaintiff Stanley Edington is employed by a school which is operated solely for religious purposes. Each of the teacher plaintiffs is a "born again" Christian and is a person who has embraced teaching and the moral and religious formation of the young as a Christian apostolate.

19. The aforesaid Christian schools:

(a) are religious enterprises; the schools of Grace Brethren Church, Scott Memorial Baptist Church and Calvary Cross Church of the Highlands are conducted as an integral part of the religious mission of those churches,

(b) are institutions whose substantial, if not dominant, purpose is the inculcation of religious values,

(c) are institutions in which religion is so pervasive that a substantial portion of their function is subsumed

in the religious mission which is the only reason for the schools' existence,

(d) are institutions whose affirmative, if not dominant, policy of instruction for school children is to assure future adherents to the Christian faith by having control of their education at an early age,

(e) carry on activities, a substantial portion of which are religiously oriented,

(f) conduct and sponsor religiously oriented extracurricular activities,

(g) are housed in buildings some of whose exteriors contain identifying religious symbols, and whose interiors, such as classrooms and hallways, contain Christian religious symbols, as well as inspirational quotations from scripture and other religious doctrinal sources,

(h) are institutions which have an atmosphere in which religious instruction and religious vocations are integral in the total educational function,

(i) are institutions which are vehicles for transmitting the Christian faith to the next generation,

(j) are institutions which involve substantial religious activity and purpose,

(k) employ teachers who are subject to the direction and discipline of religious authority which necessarily pervades the school,

(l) employ teachers who work in schools which are operated to inculcate the tenets of the Christian religion and which are dedicated to rearing children in that faith,

(m) employ teachers, all of whom are Bible-believing-and-practicing Christians, and

(n) are operated in accordance with the convictions of their memberships, sourced solely in their religion as required by the Bible, for the ultimate purpose of instructing children in the philosophy and mandates of the Scriptures, in such manner as to lay a biblically motivated educational foundation for the free choice of spiritual salvation and discipleship,

(o) do not divide instruction into "religious" and "secular" compartments, the entire ongoing life of the church-school community being religious.

20. All of the plaintiffs, and the memberships of the aforesaid churches, are believers who hold a firm religious conviction that the Bible is the inspired and inerrant Word of God and that it must serve as a source of guidance for all aspects of life and conduct. The inspired Word of God is to the plaintiffs and their members a definitive manual of convictional belief and instruction.

21. The operations of the plaintiffs are centered on the Biblical concepts that all men are sinners, and that the consequence of sin is eternal separation from God for eternity in a literal hell and that this consequence can be avoided in only one way, by trusting in Jesus Christ, alone, for one's salvation. Plaintiffs' respective memberships further believe that salvation is a free gift given by God to all who trust in Jesus Christ and that the fact of His death, burial and resurrection is a payment for all sins for those who only believe.

22. In observance of the commands of the Bible, plaintiffs, as a matter of firm conviction and practice of their respective members, operate educational ministries, all of which are conducted for the sole and ultimate purpose of spreading the Christian Gospel's Good News of the manner in which salvation is obtained, and teaching and growing in discipleship to the Lord Jesus Christ.

DEFENDANTS

23. Defendant, THE HONORABLE F. RAY MARSHALL is Secretary of Labor of the United States of America.

24. Defendant, THE HONORABLE MARTIN R. GLICK is Director of the California Employment Development Department.

25. Each individual defendant is sued individually and in his official capacity. Relief is sought against all defendants jointly and severally as well as their agents,

assistants, successors, employees, attorneys and all persons acting in concert or cooperation with them or at their direction. Defendant THE HONORABLE MARTIN R. GLICK, Director of the California Employment Development Department, acting in conformity with directives of Defendants UNITED STATES OF AMERICA and THE HONORABLE F. RAY MARSHALL, Secretary of the UNITED STATES DEPARTMENT OF LABOR, is presently, and will be, acting under color of authority and the laws of the State of California. All the defendants are engaged in the enforcement and execution of the laws of the State of California and/or the United States and more particularly the Federal Unemployment Tax Act with respect to church-schools, and rules and regulations promulgated or about to be promulgated and enforced by the defendants. Plaintiffs are and will be deprived of constitutionally protected rights by the application of these laws, rules and regulations to them. The defendants are responsible for the enforcement and execution of these laws and the promulgation and enforcement of rules and regulations against the plaintiffs.

FACTUAL ALLEGATIONS

26. In 1970, the United States Congress extended unemployment insurance coverage to include services performed for nonprofit organizations by requiring that state unemployment laws cover these services effective January 1, 1972, as a condition for federal certification of the state law for tax credit against the federal unemployment tax (Public Law 91-373). States were, however, permitted to exclude certain services from coverage, including the following services described in Section 3309 (b) of the Internal Revenue Code performed:

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) by an employee of a school which is not an institution of higher education."

27. In 1976, Congress further amended the Federal Unemployment Tax Act to require that effective January 1, 1978, states delete the exemption under Paragraph (3) above relating to elementary and secondary schools as a condition for federal certification of the state law for tax credit against the federal unemployment tax (Public Law 94-566). The Congress left standing Paragraph (1) and (2) above. 26 U.S.C. § 3309 (b) (1) (2).

28. Section 101 of the California Unemployment Compensation Code specifies that California's unemployment compensation program is part of the federal unemployment compensation plan. Accordingly, the California Unemployment Compensation Code was amended in 1978 so as likewise to delete the exemption for employees of schools which are not institutions of higher education. Section 534.5, California Unemployment Insurance Code, as amended January 30, 1978. See 78 Cal. Legis. Serv. 17. The same enactment also added a provision, as Section 106, that "This act is necessary to implement [federal] Public Law 94-566, which is hereby deemed to be a 'federal mandate' within the meaning of Sections 2206 and 2271 of the Revenue and Taxation Code."

29. On April 18, 1978, the defendant Secretary of Labor F. Ray Marshall announced a decision that the aforesaid repeal by Congress of the exclusion from coverage of employees of schools which are not institutions of higher education was intended to result in state law coverage of church-related schools. A letter from Lawrence E. Weatherford, Administrator, Unemployment Services, U.S. Department of Labor, setting forth that decision is appended hereto as Exhibit A.

30. On May 30, 1978, Lawrence W. Rogers, Administrator of Field Operations, Employment and Training Administration, U. S. Department of Labor, issued a directive to all state employment security agencies setting forth the same decision and the reasons therefor. This directive recites, in part:

> "The only services performed in church-related elementary and secondary schools recognized as being within the scope of the exclusion permitted by section 3309(b)(1), FUTA [Federal Unemployment Tax Act] . . . are those *strictly church duties* performed by church employees at the school *pursuant to their church responsibilities.*" (Emphasis supplied.)

A copy of that letter is appended as Exhibit B hereto.

31. On May 22, 1978, the defendant State of California, through E. L. Sullivan, Deputy Director of the Employment Tax Division, Department of Benefit Payments, issued Division Notice No. 78-13, entitled "Church-Related Schools and Activities", to Employment Tax Division Administrators/Supervisors. The notice recognized and implemented in California the aforesaid decision of the United States Department of Labor to place employees of church-schools under compulsory unemployment compensation coverage. A copy of this Notice is appended as Exhibit C hereto.

32. In January, 1978, by undated letter to "non-profit church-related schools", signed by the aforementioned E. L. Sullivan, the Department of Benefit Payments stated that, effective January 1, 1978, such schools must be in conformity with federal law because they are subject to the mandatory coverage provisions of the California Unemployment Compensation Code. A copy of this letter is appended as Exhibit D hereto.

33. The pastor plaintiffs thereafter filed under protest with the Department the reports demanded, claiming, however, that services performed as part of their churches' educational ministries are services described

in Section 3309(b)(1) and (2) and hence are not services required to be covered by the governmental unemployment compensation program.

34. Christian Unified Schools of San Diego and Redwood Christian Schools likewise filed under protest the reports demanded, upon the belief that the imposition of the federal-state unemployment compensation program upon them was a direct violation of the rights of the said schools protected by the First and Fourteenth Amendments to the Constitution of the United States.

35. Following enactment of the 1978 amendments, demands have been made upon the plaintiff churches, to institute the State disability compensation program under Section 2601, *et seq.*, of the California Unemployment Insurance Code. See "Final Notice" dated October 6, 1978, from the State of California Department of Benefit Payments to Calvary Cross Church of the Highlands, hereto appended as Exhibit E.

36. Redwood Christian Schools had, prior to the 1978 amendments to the California Unemployment Insurance Law, instituted a private disability compensation program for the benefit of its employees. Following enactment of the 1978 amendments, demand was made upon Redwood Christian Schools to institute, in place of this private program, the State disability compensation program under Section 2601, *et seq.*, of the California Unemployment Insurance Code. Threatened with penalties, Redwood Christian Schools has complied with the State's demand. See letter of Redwood Christian Schools dated September 11, 1978, hereto appended as Exhibit F.

37. Section 2606(b) of the California Unemployment Insurance Code, as amended January 30, 1978, provides exemption from the Code's disability compensation as to service performed by an individual

> ". . . As a duly ordained priest, clergyman, rabbi, rector, vicar, pastor, or minister of religion, or by a practitioner who heals the sick by prayer in the practice of religion, or by a reader whose duty it is to conduct regular religious services of a religious

organization, or by a member of a religious order in the exercise of duties required by the order, or by any other individual performing service in the practice of religion by designation of the governing body of a religious organization and subject to discipline by, including removal by, such governing body."

38. The California Unemployment Compensation Code, as now enacted:

(1) exempts from coverage employees of religious organizations which are not churches, conventions or associations of churches or of organizations operated, supervised, controlled, or principally supported by a church or convention or association of churches; but it mandates coverage for employees of religious organizations operated primarily for religious purposes which are not operated, supervised, controlled or principally supported by a church or convention or association of churches,

(2) requires coverage of employees of non-church operated and controlled religious organizations, while the Federal Unemployment Tax Act, Section 3306(c)(8) exempts such employees from coverage.

39. Subjecting of the plaintiff churches and schools to the provisions of the California Unemployment Insurance Code and the Federal Unemployment Tax Act, is resulting and will result in substantial new financial burdens to these private, non-tax supported religious entities which burdens will have the necessary effects of either seriously impairing their ability to carry out their religious educational ministry or of forcing them to cease to carry it on.

40. The results of these burdens, with their inevitable aforesaid effects, are:

—to endanger or destroy the ability of the plaintiff parents to choose a religious education for their children through the religious educational ministries of the plaintiffs,

—to endanger or destroy the opportunity of the plaintiff teachers to carry out the religious mission to which they have dedicated themselves in the formation and education of young people as Christians,

—To endanger or destroy the opportunity of the plaintiff pastors and the religious administrators of the plaintiff schools to exercise their religious ministry in education,

—To force private, non-tax supported religious entities to abandon private disability programs which they had desired for their employees and had adjudged best suited to their organizations and to substitute a state disability program, with its costs, reporting features and sanctions which the religious entities do not desire and cannot afford.

41. Application of the California Unemployment Insurance Code, and regulations thereunder, to the plaintiff churches in the exercise of their religious ministry in education has caused, and will continue to cause, intensive administrative interrelationships between churches and the state in the form of reporting, extensive disclosures of financial information, and general governmental supervision of the unemployment compensation program.

42. Application of the California Unemployment Insurance Code and related regulations to the plaintiff churches in the exercise of their religious ministry in education involves government in the determination of questions of whether termination of employment was for "good cause". For the plaintiff institutions these questions can be religious in nature.

COUNT 1

43. The plaintiffs incorporate by reference Paragraphs 1 through 42 of the Complaint.

44. No statute of the Congress of the United States or of the State of California authorizes the defendants to impose upon churches and their religious ministries unemployment compensation coverage (including the

paying of taxes related thereto and the making of reports in relation thereto).

45. The aforesaid decision of May 30, 1978, by the defendant Secretary of Labor of the United States, and the policy thereafter adopted pursuant thereto by the defendant State of California, imposing government unemployment compensation coverage upon the religious educational ministries operated by the pastor plaintiffs, are therefore *ultra vires* and of no legal effect.

46. For the defendants to impose said requirements upon the plaintiffs is therefore unreasonable and arbitrary, depriving them of liberty and property in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

COUNT II

47. The plaintiffs incorporate by reference the allegations of Paragraphs 1 through 42 of the Complaint.

48. The aforesaid policy of imposing government unemployment compensation coverage upon the religious educational ministries operated by the church plaintiffs and school plaintiffs violates the Free Exercise Clause of the First Amendment of the Constitution of the United States inasmuch as:

(a) it imposes a tax and other financial burdens upon purely religious activity;

(b) It imposes burdens of accounting and reporting upon religious ministries;

(c) it reaches into churches and places under an unsolicited government program of employee benefits, church employees who are engaged in carrying out a religious ministry;

(d) it burdens and endangers the ability of parents to choose a religious education for their children;

(e) it burdens and endangers the opportunity of religious teachers to carry out their religious vocation in the Christian formation and education of young people;

(f) it burdens and endangers pastors of churches and religious administrators of religious schools in the exercise of their religious ministry in education;

(g) under familiar principles of unemployment compensation law, and under the laws of California, an award of unemployment compensation may depend upon a determination having been made by a governmental entity of whether there was dismissal from employment for "just cause". Dismissal from employment from a church entity, however, may in given instances be on religious (including moral) grounds. Yet a governmental agency rendering the "just cause" determination may not base its determination upon religious principles but solely upon secular standards. Thus the churches may be required to pay unemployment compensation where dismissal was based upon religious grounds.

49. There is no compelling state interest to justify these violations of plaintiffs' religious liberty.

COUNT III

50. The plaintiffs incorporate by reference the allegations of Paragraphs 1 through 42 of the Complaint.

51. The aforesaid policy of imposing government unemployment compensation coverage upon the religious educational ministries operated by the pastor plaintiffs and school plaintiffs violates the Establishment Clause of the First Amendment of the Constitution of the United States inasmuch as:

(a) it embraces, and is based solely upon, a definition of religion by government, and a determination by government of what constitutes the religious mission of a church or other religious body;

(b) where a dismissal from employment by the church is based upon religious (including moral) grounds, and the governmental agency rendering a "just cause" determination takes the religious grounds into account, it engages in excessive governmental entanglements with religious contrary to the

requirements of the Establishment Clause. Here the potential for such action is present;

(c) a forbidden potential for entanglement between church and state is created by the requirements of accounting, reporting and disclosure by churches as found in the statutes and administrative regulations of the State of California relating to unemployment compensation.

COUNT IV

52. The plaintiffs incorporate by reference the allegations of Paragraphs 1 through 42 of the Complaint.

53. The aforesaid policy of imposing government unemployment compensation coverage upon the religious educational ministries operated by the pastor plaintiffs and school plaintiffs violates rights guaranteed to them by the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States, inasmuch as the said plaintiffs will be arbitrarily deprived of rights of property and enterprise as their non-tax supported churches are burdened with the costs of an arbitrarily imposed social program.

COUNT V

54. The plaintiffs incorporate by reference the allegations of Paragraphs 1 through 42 of the Complaint.

55. The aforesaid policy of imposing government unemployment compensation coverage upon the religious educational ministries operated by the pastor plaintiffs denies to plaintiffs the equal protection of the laws contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States, inasmuch as it arbitrarily exempts certain religious ministries from coverage while imposing coverage on others.

56. The plaintiffs have no plain, speedy or adequate remedy at law.

57. The plaintiffs will suffer immediate and irreparable injury unless injunctive relief is granted.

WHEREFORE, plaintiffs pray that the following relief be granted:

(1) That the Court declare that the religious educational ministries of the churches operated by the pastor plaintiffs and by school plaintiffs are exempt from unemployment compensation coverage by the terms of Section 3309(b)(1) and (2) of the Federal Unemployment Tax Act; that they are similarly exempt under the California Unemployment Insurance Code, Sections 634.5 and 2601 *et seq.*

(2) That, should the Court determine that the religious educational ministries operated by the pastor plaintiffs are not exempt from unemployment compensation coverage under the terms of the Federal Unemployment Tax Act (and under the California Unemployment Insurance Code, Sections 634.5 and 2601 *et seq.*), it declare those statutes unconstitutional as applied to the religious educational ministries operated by the pastor plaintiffs and school plaintiffs.

(3) That the Court preliminarily and permanently enjoin and restrain the defendants from applying to the religious educational ministries operated by the pastor plaintiffs and school plaintiffs the aforementioned provisions of the California Unemployment Insurance Code and of the Federal Unemployment Tax Act.

(4) That the Court allow the plaintiffs the costs herein and reasonable attorneys' fees and such other relief as the Court appears to be equitable and just.

Dated: January 8, 1979

ERIC NELSON LINDQUIST
ROBERT L. TOMS
LISA A. RUNQUIST
CALDWELL & TOMS
WILLIAM BENTLEY BALL
PHILIP J. MURREN
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By /s/ Eric Nelson Lindquist
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Attorneys for the State of California Employment Development Department and Martin Glick

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-0093 MKP (KX)

GRACE BRETHREN CHURCH and REVEREND DAVID L. HOCKING, its Pastor; CALVARY CROSS CHURCH OF THE HIGHLANDS and REVEREND DONALD B. SHELEY, its Pastor; SCOTT MEMORIAL BAPTIST CHURCH and REVEREND TIM LAHAYE, its Pastor; CHRISTIAN UNIFIED SCHOOLS OF SAN DIEGO; REDWOOD CHRISTIAN SCHOOLS; SIDNEY BOWEN and PATRICIA BOWEN, his wife; PETER FARRELLY, his wife; WILLIAM TSCHANTZ and JANET TSCHANTZ, his wife; ARTHUR BRANDWOOD and CHERYL BRANDWOOD, his wife; STANLEY EDINGTON; R. FLORENCE MURTI; and R. SUZANNE ROYER, PLAINTIFFS

v.

STATE OF CALIFORNIA, acting through the EMPLOYMENT DEVELOPMENT DEPARTMENT; The Honorable MARTIN R. GLICK, Director of Employment Development; UNITED STATES OF AMERICA, acting through the UNITED STATES DEPARTMENT OF LABOR; and The Honorable F. RAY MARSHALL, United States Secretary of Labor, DEFENDANTS

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, CROSS-CLAIMANT

v.

RAYMOND MARSHALL, as Secretary of Labor of the United States, CROSS-DEFENDANT

ANSWER OF DEFENDANTS THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT AND MARTIN GLICK TO COMPLAINT FOR DECLARATORY RELIEF AND FOR PRELIMINARY PERMANENT INJUNCTIONS AND CROSS-CLAIM

Filed Feb. 2, 1979

COMES NOW, defendants the State of California Employment Development Department and Martin Glick (hereinafter sometimes referred to collectively as "defendants"), who, in answer to the Complaint for Declaratory Relief for Preliminary and Permanent Injunctions, admit, deny, and allege as follows:

1. In answer to the allegations contained in paragraphs 1-22, inclusive, defendants lack information or belief sufficient at this time to answer said allegations and upon that basis deny generally and specifically each and every allegation contained therein.

2. In answer to the allegations contained in the last three (3) sentences of paragraph 25, defendants deny generally and specifically each and every allegation contained therein.

3. In answer to the allegations contained in line seventeen (17) of paragraph 28, defendants deny the words "California Unemployment Compensation Code" and allege in their place the word "California Unemployment Insurance Code" and by such reference so allege throughout the entire complaint in all places where the same words appear.

4. In answer to the allegations contained in paragraphs 33-36, inclusive, lack information or belief suffi-

cient at this time to answer said allegations and upon that basis deny generally and specifically each and every allegation contained therein.

5. In answer to the allegations contained in paragraph 38, deny generally and specifically each and every allegation contained therein.

6. In answer to the allegations contained in paragraph 39, defendants deny generally and specifically each and every allegation contained therein.

7. In answer to the allegations contained in paragraph 40, and in each and every subpart thereof, defendants deny generally and specifically each and every allegation contained therein.

8. In answer to the allegations contained in paragraph 41, defendants deny generally and specifically each and every allegation contained therein.

9. In answer to the allegations contained in paragraph 42, defendants lack information or belief sufficient at this time to answer said allegations and upon that basis deny generally and specifically each and every allegation contained therein.

10. In answers to the allegations contained in paragraph 43, defendants incorporate the answers contained in paragraphs 1-9, above, inclusive, at this point as though set forth in full.

11. In answer to the allegations contained in paragraphs 44-46 inclusive, defendants deny generally and specifically each and every allegation contained therein.

12. In answer to the allegations contained in paragraph 47, defendants incorporate the answers contained in paragraphs 1-9 above, inclusive, at this point as though set forth in full.

13. In answer to the allegations contained in paragraph 48, and in each and every subpart thereof, defendants deny generally and specifically each and every allegation contained therein.

14. In answer to the allegations contained in paragraph 49, defendants deny generally and specifically each and every allegation contained therein.

15. In answer to the allegations contained in paragraph 50, defendants incorporate the answers contained in paragraphs 1-9, above, inclusive, at this point as though set forth in full.

16. In answer to the allegations contained in paragraph 51, and in each and every subpart thereof, defendants deny generally and specifically each and every allegation contained therein.

17. In answer to the allegations contained in paragraph 52, defendants incorporate the answers contained in paragraphs 1-9, above, inclusive, at this point as though set forth in full.

18. In answer to the allegations contained in paragraph 53, the Employment Development Department and Martin Glick deny generally and specifically each and every allegation contained therein.

19. In answer to the allegations contained in paragraph 54, defendants incorporate the answers contained in paragraphs 1-9, above, inclusive, at this point as though set forth in full.

20. In answer to the allegations contained in paragraphs 55-57, inclusive, defendants deny generally and specifically each and every allegation contained therein.

CROSS-CLAIM FOR DECLARATORY RELIEF

COME NOW, defendants and cross-claimants, the State of California Employment Development Department and Martin Glick as Director of the California Employment Development Department (hereinafter referred to as the "cross-claimants") and for a cause of action against defendant and cross-defendant Raymond Marshall as Secretary of Labor of the United States (hereinafter referred to as the "Secretary"), allege as follows:

1. This is a civil action for declaratory relief seeking a declaration of the interpretation of Federal Unemploy-

ment Tax Act section 3309(b)(1) and California Unemployment Insurance Code section 634.5 as such sections apply to services performed for church-run pre-schools, elementary schools, secondary schools, colleges, or universities, including but not limited to, services performed for such nonprofit organizations as the religious educational ministries of the churches operated by the pastor plaintiffs and school plaintiffs herein.

2. Jurisdiction is conferred upon this court under 28 U.S.C. section 1331 and 28 U.S.C. section 1441.

3. The Department is the duly constituted state governmental agency charged with the administration, imposition, enforcement and collection of taxes under the California Unemployment Insurance Code (hereinafter sometimes referred to as the "California Code") and was and now is subject to the control of its director, Martin Glick.

4. At all times material hereto, the Secretary was and now is a public official appointed by the President of the United States and was and now is Secretary of the United States Department of Labor. The Secretary was and now is responsible for enforcing the conformity and compliance provisions of the Federal Unemployment Tax Act (hereinafter sometimes referred to as the "Federal Act").

5. The federal government collects unemployment insurance tax from specified employers pursuant to the Federal Act. In order to encourage States to adopt federal standards regarding, among other matters, which employees are covered by the State programs, as employer is allowed a credit against his federal unemployment tax for tax paid or which would have been paid but for a reduced State tax rate pursuant to qualified State programs. The California unemployment program is now and at all times material hereto has been such a qualified State program.

6. Effective January 1, 1972, Congress amended the Federal Act to require each State, as a condition of tax credit against the federal tax for State unemployment

insurance law to extend compulsory coverage to services performed by certain employees of nonprofit organizations pursuant to Section 104 of Public Law 91-373. Simultaneously, it set forth in section 3309(b) of the *Internal Revenue Code* several categories of employment which could be excluded from qualified State unemployment insurance coverage, including services performed:

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> "(3) in the employ of a school which is not an institution of higher education."

7. Effective January 1, 1972, amended the California Code to extend unemployment insurance coverage to conform to Public Law 91-373, and to expand prior coverage of certain employees of nonprofit hospitals for disability insurance to cover the same employees for disability insurance as those newly covered for unemployment insurance. Simultaneously, it set forth in section 634.5 of the California Code several categories of excluded employment, including services performed:

> "(a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.
>
> "(b) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry

or by a member of a religious order in the exercise of duties required by such order.

"(c) In the employ of a school which is not an institution of higher education."

8. Effective January 1, 1978, Congress repealed the permissible exclusion contained in *Internal Revenue Code* section 3309(b)(3) set forth above for service performed "in the employ of a school which is not an institution of higher education," while retaining the permissible exclusions contained in sections 3309(b)(1) and 3309(b)(2).

9. Also effective for unemployment insurance tax purposes on January 1, 1978, and for disability tax purposes on April 1, 1978, California repealed the exclusion contained in section 634.5(c), for service performed "[i]n the employ of a school which is not an institution of higher education," while retaining the exclusions contained in section 634.5(a) and 634.5(b).

10. On April 18, 1978, the Secretary announced his decision that the deletion of section 3309(b)(3) meant that employees of church-operated schools could not be permissibly excluded from State unemployment insurance programs. A true and correct copy of the Secretary's decision is attached hereto, marked as Exhibit "A" and by this reference incorporated herein. This decision was formally communicated to States, including California, on or about May 30, 1978. A true and correct copy of this communication is attached hereto, marked as Exhibit "B" and by this reference incorporated herein. Since sometime after May 30, 1978, cross-claimants have been and are now presently attempting to collect unemployment tax as of January 1, 1978 and unemployment tax information for the claims filed commencing January 1, 1978, until the present, from churches which operate schools, including but not limited to the religious educational ministries of the churches operated by the pastor plaintiffs and school plaintiffs herein, who have not withheld said taxes.

11. There is an existing and continuing controversy between the Secretary and cross-claimants as to the proper interpretation of the provisions of section 3309(b)(1) and (2) of the Federal Unemployment Tax Act. Cross-claimants strongly support the principle of maximum extended coverage. Cross-claimants seek a declaration as to the proper interpretation of section 3309(b)(1) and (2).

12. Cross-claimants interpret section 3309(b)(1) of the Federal Act to permit States to exclude from unemployment coverage:

a. Service performed by individuals in the employ of a church in any capacity in connection with the operation of any educational institution, including but not limited to, pre-schools, elementary schools, secondary schools, colleges, or universities;

b. Such services performed for a convention or association of churches.

13. Cross-claimants interpret section 3309(b)(2) of the Federal Act to permit States to exclude from unemployment insurance coverage service performed for any nonprofit organization by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order, even when the services are not performed in the employ of a church or any other organization by section 3309(b)(1) of such Act.

14. The Secretary interprets section 3309(b)(1) and (2) of the Federal Act as requiring States, as a condition of allowance of tax credits under section 3304 of such Act, to extend compulsory unemployment insurance coverage by state law to employees of all nonprofit preschools, elementary schools and secondary schools, except that the following may be exempted:

a. Services for church schools preparing candidates for the priesthood, ministry, or rabbinate;

b. Services by church employees who perform strictly church duties pursuant to their religious responsibilities at church-run schools.

15. Pursuant to sections 3304(a)(6), 3304(c) and 3309 of the Federal Act, cross-claimants must substantially comply, and now are complying, with the Secretary's interpretation as to which services under such section 3309 must be covered by California for unemployment insurance, and which services may be permissibly excluded by California from unemployment insurance coverage. If the Secretary finds that California has failed to comply substantially with the Secretary's interpretation of such provisions, the Secretary cannot continue to certify section 634.5 of the California Unemployment Insurance Code for the purposes of allowing California employers the basic and additional tax credits against the federal tax imposed by the Federal Act. Thus, there is a continuing controversy between the cross-claimants and the Secretary as to the proper interpretation of section 3309(b)(1) and (2) of the Federal Act and the derivative interpretation of identical provisions of section 634.5 of the California Code.

WHEREFORE, defendants and cross-claimants pray that:

1. The Court determine the rights and duties of the respective parties herein;
2. The Court interpret Federal Unemployment Tax Act section 3309(b)(1) and (2) and California Unemployment Insurance Code section 634.5;
3. The Court find that the Federal Unemployment Tax Act section 3309(b)(1) and (2) and California Unemployment Insurance Code section 634.5 and 2601 et seq. are constitutional;
4. The Court find that plaintiffs' constitutional rights have not been violated;
5. The Court deny plaintiffs a preliminary injunction and a permanent injunction;

6. The Court deny plaintiffs' attorneys fees in any amount;

7. The Court award defendants and cross-claimants their costs of suit incurred herein; and

8. The Court render such other and further relief as it may deem just, necessary and proper.

Dated: 2/2/79

GEORGE DEUKMEJIAN,
Attorney General
PHILIP C. GRIFFIN,
LAWRENCE K. KEETHE,
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By /s/ Lawrence K. Keethe
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-0093-MRP (Kx)

GRACE BRETHREN CHURCH, ETC., ET AL., PLAINTIFFS

v.

STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, ET AL., DEFENDANTS

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, CROSS-CLAIMANT

v.

RAYMOND MARSHALL, as Secretary of Labor of the United States, CROSS-DEFENDANT

NOTICE OF MOTION AND MOTION TO DISMISS

March 29, 1979

1:30 p.m.

Filed Mar. 8, 1979

TO: PLAINTIFFS, GRACE BRETHREN CHURCH, REVEREND DAVID L. HOCKING, CALVARY CROSS CHURCH OF THE HIGHLANDS, REVEREND DONALD B. SHELEY, SCOTT MEMORIAL BAPTIST CHURCH, REVEREND TIM LA-HAYE, CHRISTIAN UNIFIED SCHOOLS OF SAN DIEGO, REDWOOD CHRISTIAN SCHOOLS, SIDNEY and PATRICIA BOWEN, PETER and SUE FARRELLY, WILLIAM and JANET TSCHANTZ, ARTHUR and CHERYL BRANDWOOD, STANLEY EDINGTON, R. FLORENCE MURTI, R. SUZANNE ROYER, AND THEIR ATTORNEYS OF RECORD, CALDWELL & TOMS by ERICK NELSON LINDQUIST, and BALL & SKELLY by WILLIAM BENTLEY BALL; AND TO THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, AND THEIR ATTORNEY OF RECORD, DEPUTY ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, LAWRENCE K. KEETHE:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that on Thursday, March 29, 1979, at 1:30 p.m., the Federal Defendant, Secretary of Labor, will bring on for hearing a Motion to Dismiss in the above-captioned matter. The hearing will take place before the Honorable Mariana R. Pfaelzer, United States District Judge, in her courtroom, United States Courthouse, 312 North Spring Street, Los Angeles, California.

This Motion is made pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, on the grounds that this Court lacks jurisdiction over the subject matter of this action.

This Motion is based upon this Notice of Motion, the Memorandum of Points and Authorities in Support of Federal Defendant's Motion to Dismiss, all pleadings, records, and files in this action, and any oral and docu-

mentary evidence that may be produced at the hearing of said Motion.

DATED: This 8th day of March, 1979.

ANDREA SHERIDAN ORDIN
United States Attorney
FREDRICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

By /s/ Stephen E. O'Neil
STEPHEN E. O'NEIL
Assistant United States Attorney
Attorneys for Federal Defendant.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL DOCKET

Date	Nr.	Proceedings
1-12-79	dg	1. Fld petn for removal w/copy of sums & complt Case may be ref to Mag Schnieder
1/30/79	cm	2. Fld ORD (RF & MRP) dtd 1/30/79 transfng actn to the cal of Judge Pfaelzer for all fur proceedings. Attys notified.
2/1/79	cm	3. Fld dft (State of CA & Martin Glick)'s ANSWER to cmplnt & CROSS-CLAIM.
/1/79	cm	4. Fld prae & issd summons on X-claim.
1/31/79	cm	5. Fld USA's stip & ORD(RF) ext ti to rspnd to cmplt to 2/20/79.
2/20/79	cm	6. Fld pltf's notc of mtn & mtn fr prelim inj retnble 3/19/79, 9:30AM.
		7. Fld pltf's memo in supt of prelim inj.
		8. Fld pltf's declaratn in supt of mtn.
		LODGED pltf's proposed prelim inj.
2/20/79	cm	9. Fld Federal dft's memo in supt of mtn to dism.
		10. Fld dfts' notc of mtn & mtn to dism retnble 3/26/79, 10AM.
2/23/79	cm	11. Fld retrn of sumons on X-claim, srvd Raymond Marshall 2/15/79.
3/15/79	cm	12. Fld dft's memo in oppos to mtn fr prelim inj.
		13. Fld dft's memo in oppos to mtn to dism.
3/15/79	cm	14. Fld dft's memo of P/A in oppos to pltf's mtn fr prelim inj.

Date	Nr.		Proceedings
3/22/79	ab	15.	Fld pltfs' req for judicial not, hrg 3/29/79 at 1:30pm.
		16.	Fld pltfs' reply to opp to mot for prelim inj.
/29/79	jcd	17.	Fld defts' Notc of motn and motn to dsms, retbl on 3/30/79, 9:00 a.m.
/29/79	eg	18.	MIN ORD: Ord defts mot to dismiss & pltfs mot for prelim injunc contd to 3/30/79, 10AM.
/30/79	eg	19.	MIN ORD: Ord defts mot to dismiss, pltfs mot for prelim injunc & govt defts mot to dismiss State of Calif x-claim stand submitted.
/29/79	eg	20.	Fld defts memo of pts & auths in suppt of mot to dismiss x-claim.
-4-79	dg	21.	Fld dfts suppl memo of P/A in oppos to mot for prelim inj.
	dg	22.	Fld dfts declaratn of James M. Bratt
-7-79	dg	23.	Fld pltfs suppl memo of P/A in supp of mot for prelim inj.
	dg	24.	Fld pltfs declaratns of Dorothy E. White, Ellen Quandt, Sherryl Delto, Nathanael P. Lucas, Doanld A. Daucher, Laurita Westling, Wilma Smallin, Wilma Weyland, & Dean Dammann (second) in support of mot for prelim inj.
-11-79	dg	25.	Fld Federal dfts supplementary memo
-23-79	dg	26.	MIN ORD: Cnsl argu on previously submtd mots—mots remain under submission
-1-79	dg	27.	Fld dfts Employmnt Developmnt Dept & Martin Glick oppos to Fed. dfts mot to dsms cross-clm

Date	Nr.		Proceedings
9/21/79	rlb	28.	Fld ORD that defts State & Martin Glick are enjoined frm collecting unemployment ins tax frm plfs Grace Brethern Church & plf The Lutheran Church-Missouri Synod; That plf Grace Brethern Post bond In sum of $1,000.00 & plf Luthern Churdc post bond In sum of $5,000.00; Mot of Sec of Labor to be dsmd is Denied; Mot of Sec to dsm State's x-clm is Granted. (Ent 9/25/79 m/cpys & ntfd prtys)
9-21-79	yd	29.	Fld Crt Opinion
9-21-79	yd	30.	Fld Stip & ORD setting bond by pltfs' to $5,000 in suppt of prelim injunctn issued this Crt on 9-21-79; bond posted no later than 15 days after entry of stip
10-5-79	yd	31.	Fld undertkng bond for $5,000 from Fidelity & Deposit Company of Maryland, Bond #9297216
11-14-79	yd	32.	Fld pltfs resp to motn for clarificatn
11/19/79	fb	33.	Fld deft's USA, Of Labor NOTICE OF APPEAL to the 9th Cir. C/A fr ord ent on 9/25/79.
11-27-79	yd	34.	Fld deft's designatn of rptr's transcrpt of proceedngs
11-30-79	lw	35.	Fld State defts' NOTC OF APPEAL to 9th Cir C/A frm Ord ent 9-25-79.
11/29/79	fb		Fld origin of Reptr's transc of predgs had on 3/29/79, & 3/30/79 Vol 1; 5/23/79 Vol 2.
12-3-79	yd	36.	MIN ORD: Hrg re State of Calif. motn for clarificatn; Crt & cnsl confr re Govt appeal; Crt states no injunctn was issd against Fed defts; cnsl to notify Crt as

Date	Nr.	Proceedings
		to which pltfs are sep incorporatd & which are not; cnsl to stip on schedule for flng briefs & declaratns; Crt ORD fur hrg cont to 1-28-80, 11AM
12-21-79	yd	37. Fld stip re numbr of separately inc schools
12-24-79	yd	38. Fld defts notc of nondesignatn of rptr's transcrpt of proceedngs
1-28-80	yd	39. MIN ORD: Hrg State of Calif. motn for clarificatn of prelim injunctn; Crt tkes motns under submissn
5-6-80	cg	40. MIN ORD: crt ords prelim injunc grntd in prt & Denied in prt. cnsl to notify clk as to settng of status conf, crt ords bond to stand, crt to prepare ord on prelim injunc
5-23-80	lf	41. MIN ORD: crt sets stat conf for 5-30-80, 9:30AM
5-30-80	cg	42. MIN ORD: crt states to cnsl to file memo & a PTC, Crt to pre-trial matter the dy of trial, crt sets C/T for 7-23-80 at 9:30am, cnsl to file stip
7-20-80	cg	Rec'd fr the USC/A a cpy of the ord of dism of the apeal, ptys are to bear their own costs
8/4/80	rlb	43. MIN ORD: Hrg flng & sprdng jdgmt frm USCCA dsmg appeal: ORD mandate fld & sprn Fld cc jdgmt USCCA dsmg appeal upon stip. (ENT 8/6/80)
8-7-80	cg	LODGED-pltfs PTC ord
8-12-80	cg	43. Fld PTC ORDER as stated w/in this ord
9-2-80	cg	44. Fld Federal defts memo of P/A in opp to mot for establishment of class actn

Date	Nr.		Proceedings
11-28	cg	45.	Fld notc to cnsl tht effect 11-180, all procs in Judge Pfaelzers will be govnd by the FRCP for the Central Dist.
4/3/81	lp	46.	Fld ORDER & Judgmnt that second supplemental opinion fld their officers, agents, etc. are permanently enjoined & restrained fr collecting, etc. as stated in ORD. that defts USA, US Dept of Labor, US Sec of Labor, their officers, etc. are enjoined & restrained fr interpreting in a manner wh requires state unemployment compensation as indiated in ORD. Judgment is entered in favor of pltf. (ENT 4/6/81) Mld cpys Mld notc ptys. MD JS-6.
4/3/81	lp	47.	Fld second supplemental opinion.
4-10-81	lz	48.	Fld pltf/deft's BILL OF COSTS Retble 4-15-81, 130pm
4-15-81	md		Taxed costs in amt of $329.20 agnst defts.
4/29/81	mp	49.	Fld Deft's NOTC OF APPEAL to the SUPREME COURT frm Jdgmt ent 4-6-81
5-6-81	lw	50.	Fld deft State of Calif.'s NOTC OF APPEAL to the SUPREME COURT frm Jdgmt ent 4-6-81
5-12-81	sb	51.	Fld pltf's Ord re Bond $5,000.00
6/1/81	am	52.	Fld deft's NOTC OF APPEAL to 9th Cir C/A frm Jdgmt ent 4/6/81.
5/4/81	am	53.	Fld deft's NOTIC OF APPEAL to 9th Cir C/A frm Jdgmt ent 4/6/81. $70.00 fign & docket fees pd.

Date	Nr.	Proceedings
7-27-81	sb	54. Lodged USDC C/A stated appellant motn fr stay of appellate proceeding granted all proceeding on this appeal are stayed pending the Supreme Crt decison on the appeal before it or six months which come first. Ord subj to reconsideration by jusge if any opp os fld w/in 10dys of the entry of the ord
9-10-81	sb	LODGED PROP ORD
		55. Fld pltf Stip dism appeal
9-11-81	kt	56. Fld ORD(MRP) that appeal tkn by US Secy of Labor to the Supreme Court of the U.S. frm jdmt of this crt is dism (ENT 9-15-81)

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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C266586

THE LUTHERAN CHURCH-MISSOURI SYNOD, a nonprofit, membership corporation, on behalf of 85 member Lutheran Churches located in California; ST. JOHN'S LUTHERAN CHURCH, a nonprofit corporation; VIVADELL KEISER, an individual, PLAINTIFFS

v.

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT; MARTIN GLICK, as Director of the State of California Employment Department; RAYMOND MARSHALL, as Secretary of Labor of the United States; DOES 1 through 1000, DEFENDANTS

COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION

Plaintiffs The Lutheran Church-Missouri Synod (hereinafter referred to as "Synod"), St. John's Lutheran Church (hereinafter referred to as "St. John's"), and Vivadell Keiser (hereinafter referred to as "Keiser") (hereinafter "Synod", "St. John's" and "Keiser" will sometimes be collectively referred to as "Plaintiffs") for a cause of action against the State of California Employment Development Department (hereinafter referred to as "Department"), Martin Glick, as the Director of the State of California Employment Development De-

partment (hereinafter referred to as "Director") and Raymond Marshall as Secretary of Labor of the United States (hereinafter referred to as "Secretary") and Does 1 through 1000, by this verified Complaint allege:

PARTIES

1. At all times material hereto, Synod was and now is a nonprofit, membership corporation organized and existing under and by virtue of the laws of the State of Missouri, which is qualified to and does have members in the State of California. Synod has several hundred member churches in California. Eighty-five (85) of these churches operate primary or secondary schools as an integral part of the religious mission of the church and the Synod.

2. At all times material hereto, St. John's was and now is a nonprofit corporation organized and existing under and by virtue of the laws of the State of California, and was and now is a church located in the State of California which at all times material hereto operated and now operates a primary school in the City of Orange, State of California as an integral part of the religious mission of the church and the Synod.

3. At all times material hereto, Keiser was and now is an individual employed by St. John's as a kindergarten teacher.

4. At all times material hereto, Department was and now is an agency unit created by the legislature of the State of California as part of the Employment Agency, and was and now is subject to the control of the Director.

5. At all times material hereto, the Director was and now is a public official appointed by the governor of the State of California and was and now is Director of the Department. The Director was and now is responsible for enforcing the provisions of the *California Unemployment Insurance Code*, Section 1 *et seq.* (hereinafter referred to as the "California Code").

6. At all times material hereto, Secretary was and now is a public official appointed by the President of the United States and was and now is Secretary of the United States Department of Labor. "The Secretary was and now is responsible for enforcing the provisions of the Federal Unemployment Tax Act (hereinafter referred to as the "Federal Act")."

7. The true names and capacities, whether individual, corporate, associate or otherwise of Defendants Does 1 through 1000 are unknown to Plaintiffs who, therefore, sue such Defendants by fictitious names and Plaintiffs will ask leave of Court to amend their Complaint to show their true names and capacities when they have been ascertained. Hereinafter "Department", "Director", "Secretary" and Does 1 through 1000 will sometimes be collectively referred to as "Defendants".

STATEMENT OF FACTS

8. "In California, unemployment insurance benefits are paid by the State to eligible recipients * * * from employer contributions as set forth in the California Code. The federal government also collects unemployment insurance tax from specified employers pursuant to the Federal Act." "In order to encourage States to adopt federal standards regarding, among other matters, which employees are covered by the State programs, an employer is allowed a credit against his federal unemployment tax for tax paid pursuant to qualified State programs." The California unemployment program is now and at all times material hereto has been such a qualified State program.

9. In California, disability insurance benefits are paid by the State from a fund which consists principally of employee contributions withheld from employees' wages and paid over to the State by employers. Both the unemployment insurance program and the disability insurance program are controlled by the Department.

10. Effective January 1, 1972, Congress extended the coverage under the Federal Act to include services

performed by employees of nonprofit organizations. Simultaneously, it set forth in Section 3309(b) of the *Internal Revenue Code* several categories of employment which could be excluded from qualified State unemployment insurance coverage, including services performed:

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> "(3) in the employ of a school which is not an institution of higher education."

11. Also effective January 1, 1972, California extended coverage under the California Code to include services performed for nonprofit organizations. Simultaneously, it set forth in Section 634.5 of the California Code several categories of excluded employment, including service performed:

> "(a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.
>
> "(b) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.
>
> "(c) In the employ of a school which is not an institution of higher education."

12. Effective January 1, 1978, Congress repealed the permissible exclusion contained in *Internal Revenue Code* Section 3309(b)(3) set forth above for service performed "in the employ of a school which is not an institution of higher education", while retaining the permissible exclusions contained in Sections 3309(b)(1) and 3309(b)(2).

13. Also effective January 1, 1978, California repealed the exclusion contained in Section 634.5(c), for service performed "[i]n the employ of a school which is not an institution of higher education," while retaining the exclusions contained in Sections 634.5(a) and 634.5(b).

14. On April 18, 1978, the Secretary announced his decision that the deletion of Section 3309(b)(3) meant that employees of church-operated schools could not be permissibly excluded from State unemployment insurance programs. A true and correct copy of the Secretary's decision is attached hereto, marked as Exhibit "1" and by this reference incorporated herein. This decision was formally communicated to States, including California, on or about May 30, 1978. A true and correct copy of this communication is attached hereto, marked as Exhibit "2" and by this reference incorporated herein. Since "sometime after May 30, 1978 the Department has been and is now attempting to collect unemployment as of January 1, 1978 and unemployment tax information for the claims filed commencing January 1, 1978 until the present from churches which operate schools, including various members of the Synod and, in particular, St. John's."

15. In California, covered services for unemployment insurance purposes are the same as covered services for disability insurance purposes. Since sometime after May 30, 1978 the Department has been and is now attempting to collect "disability tax except in certain estoppel situations and disability tax information for the period" commencing April 1, 1978 until the present from churches which operate schools, including various

members of the Synod and, in particular, St. John's, and by payroll withholdings from employees of churches which operate schools, including employees of various members of the Synod, employees of St. John's and, in particular, Keiser.

16. The eighty-five (85) member churches of the Synod which operate primary or secondary schools employ varying members of personnel in teaching, administrative and custodial capacities. Each member church, including St. John's, has at least one such employee.

17. The eighty-five (85) member churches of the Synod which operate primary or secondary schools, including St. John's, have not withheld disability insurance from their employees. The State of California contends that the churches are "responsible for paying the tax except in certain estoppel situations for the period commencing" April 1, 1978 whether or not they have withheld the amounts from their employees.

CONTROVERSY BETWEEN THE PARTIES

18. There is a controversy between the Plaintiffs and the Defendants as to whether Plaintiffs are required to pay unemployment insurance tax to the State of California and as to whether Plaintiffs are required to withhold and pay disability insurance tax for the services performed in the primary and secondary schools operated by Synod churches to the State of California. Plaintiffs contend and seek a declaration from this Court that they are not required to pay unemployment insurance tax and are not required to withhold and/or pay disability insurance tax for services performed in the primary and secondary schools operated by Synod churches, for each of the following reasons:

a. Collection by the Defendants from these Plaintiffs of the unemployment insurance tax and disability insurance tax on account of services performed in the primary and secondary schools operated by

Synod churches would violate the First Amendment to the Constitution of the United States in that:

(i) Such collection would be pursuant to a law respecting the establishment of religion; and

(ii) Such collection would prohibit the free exercise of religion.

b. The individuals who work at the schools operated by Synod churches are performing services "in the employ of a church or convention or association of churches" and thus, may be permissibly excluded from coverage of a qualified State unemployment insurance program pursuant to Section 3309 (b) (1) (A) of the Internal Revenue Code and are exempt from unemployment insurance tax and disability insurance tax pursuant to Sections 634.5 (a) of the California Unemployment Insurance Code;

c. If it should be determined that the schools operated by Synod churches are organizations separate from the church by which they are operated, the individuals who work at the schools are performing service "in the employ of . . . an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;" and, thus, may be permissibly excluded from coverage of a qualified state unemployment insurance program pursuant to Section 3309 (b) (1) (B) of the Internal Revenue Code and are exempt from unemployment insurance tax and disability insurance tax pursuant to Section 634.5 (a) of the California Unemployment Insurance Code.

INJURY AND DAMAGE

19. If Defendants are not compelled to refrain from collecting unemployment insurance tax and disability insurance tax from Plaintiffs for the services performed by those individuals who work at the schools operated

by Synod churches, Plaintiffs will be irreparably injured in the following respects:

a. If Plaintiffs choose not to voluntarily pay the taxes, they will be subject to civil sanctions and subject to time-consuming, vexatious and expensive audits and other administrative processes, threatened and initiated by the Defendants in their attempt to determine the amounts allegedly due;

b. If Plaintiffs voluntarily pay the taxes, they will be deprived of monies needed for the conduct of their religious activities and mission;

c. In the event that either the Plaintiffs pay or do not pay the taxes, the attempted application of the taxes will infringe on the First Amendment rights of the Plaintiffs.

OTHER REMEDIES INADEQUATE

20. Plaintiffs have no plain, speedy or adequate remedy in the ordinary course of law. Unless restrained and enjoined, Defendants have threatened to and will violate the First Amendment rights of the Plaintiffs and have threatened to and will attempt to collect the taxes from the Plaintiffs and have and will institute numerous, separate audits, collection procedures and actions for civil sanctions resulting in a multiplicity of actions and vastly increased costs to Plaintiffs. There are no adequate administrative remedies which Plaintiffs have not exhausted in that no administative board can adjudicate the Constitutional issues raised herein and in that the remaining issues are issues of law which are beyond the special competence of any administrative agency involved herein.

WHEREFORE, Plaintiffs pray judgment against Defendants as follows:

1. For a declaration that:

a. Collection by the Defendants from these Plaintiffs of the unemployment insurance tax and dis-

ability insurance tax on account of services performed in the primary and secondary schools would violate the First Amendment to the Constitution of the United States in that:

(i) Such collection would be pursuant to a law respecting the establishment of religion; and

(ii) Such collection would prohibit the free exercise of religion.

b. The individuals who work at the schools operated by Synod churches are performing services "in the employ of a church or convention or association of churches" and thus, may be permissibly excluded from coverage of a qualified State unemployment insurance program pursuant to Section 3309 (b) (1) (A) of the Internal Revenue Code and are exempt from unemployment insurance tax and disability insurance tax pursuant to Sections 634.5 (a) of the California Unemployment Insurance Code;

c. If it should be determined that the schools operated by Synod churches are organizations separate from the church by which they are operated, the individuals who work at the schools are performing service "in the employ of . . . an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;" and, thus, may be permissibly excluded from coverage of a qualified State unemployment insurance program pursuant to Section 3309 (b) (1) (B) of the Internal Revenue Code and are exempt from unemployment insurance tax and disability insurance tax pursuant to Section 634.5 (a) of the California Unemployment Insurance Code.

2. For a preliminary injunction and a permanent injunction, all enjoining Defendants and their agents, employees, representatives, all all persons acting under, in concert with them or for them:

a. From attempting to collect from Plaintiffs unemployment insurance tax or unemployment tax information for or on account of those individuals who work at the schools operated by Synod churches and, in particular, St. John's;

b. From attempting to collect from Plaintiffs disability tax or disability tax information and from requiring Plaintiffs to withhold disability insurance tax with respect to those individuals who work at the schools operated by Synod churches and, in particular, St. John's;

3. For Plaintiffs' costs of suit herein; and

4. For such other and further relief as this Court deems proper.

DATED: December 21, 1978

PAUL, HASTINGS, JANOFSKY & WALKER

By /s/ Donald A. Daucher
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-0162 MRP(SX)

THE LUTHERAN CHURCH-MISSOURI SYNOD, a nonprofit, membership corporation, on behalf of 85 member Lutheran Churches located in California; ST. JOHN'S LUTHERAN CHURCH, a nonprofit corporation; VIVADELL KEISER, and individual, PLAINTIFFS

v.

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT; MARTIN GLICK, as Director of the State of California Employment Department; RAYMOND MARSHALL, as Secretary of Labor of the United States; DOES 1 through 1000, DEFENDANTS

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, CROSS-CLAIMANT

v.

RAYMOND MARSHALL, as Secretary of Labor of the United States, CROSS-DEFENDANT

ANSWER OF DEFENDANTS THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT AND MARTIN GLICK TO COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION AND CROSS-CLAIM FOR DECLARATORY RELIEF

COME NOW, defendants the State of California Employment Development Department and Martin Glick (hereinafter referred to collectively as "defendants"), who, in answer to the Complaint for Declaratory Relief and Injunction, admit, deny, and allege as follows:

1. In answer to the allegations contained in paragraphs 1, 2, and 3, defendants lack information or belief at this time sufficient to answer said allegations and upon that basis deny generally and specifically each and every allegation contained therein.

2. In answer to the allegations contained in paragraph 4, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in paragraph 4, defendants allege that "the Employment Development Department is a statutory department of the State of California as part of the Health and Welfare Agency, and was and now is subject to the control of its director."

3. In answer to the allegations contained in the second sentence of paragraph 6, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in the second sentence of paragraph 6, defendants allege that "the Secretary was and now is responsible for enforcing the conformity and compliance provisions of the Federal Unemployment Tax Act."

4. In answer to the allegations contained in the first sentence of paragraph 8, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in the first sentence of paragraph 8, defendants allege that "in California, unemployment insurance benefits are paid by

the State to eligible recipients principally from employer contributions as set forth in the California Code." In answer to the allegations contained in the third sentence of paragraph 8, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in the third sentence of paragraph 8, defendants allege that "in order to encourage States to adopt federal standards regarding, among other matters, which employees are covered by the State programs, an employer is allowed a credit against his federal unemployment tax for tax paid or which would have been paid but for a reduced State tax rate pursuant to qualified State programs."

5. In answer to the allegations contained in the first sentence of paragraph 10, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in the first sentence of paragraph 10, defendants allege that "effective January 1, 1972 Congress amended the Federal Act to require each State, as a condition of tax credit against the federal tax for State unemployment insurance taxes imposed upon employers, to amend State unemployment insurance law to extend compulsory coverage to services performed by certain employees of nonprofit organizations pursuant to Section 104 of Public Law 91-373."

6. In answer to the allegations contained in the first sentence of paragraph 11, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in the first sentence of paragraph 11, defendants allege that "effective January 1, 1972, California amended the California Code to extend unemployment insurance coverage to conform to Public Law 91-373, and to expand prior coverage of certain employees of nonprofit hospitals for disability insurance to cover the same employees for disability insurance as those newly covered for unemployment insurance."

7. In answer to the allegations contained in paragraph 13, defendants deny generally and specifically that

the effective date was "January 1, 1978" and defendants allege that "for unemployment insurance tax purposes the effective date was January 1, 1978, and for disability tax purposes the effective date was April 1, 1978."

8. In answer to the allegations contained in the last sentence of paragraph 14, defendants deny generally and specifically each and every allegation contained therein. In further answer to the allegations contained in the last sentence of paragraph 14, defendants allege that "since sometime after May 30, 1978 the Department has been and is now attempting to collect unemployment tax as of January 1, 1978 and unemployment tax information for the claims filed commencing January 1, 1978 until the present from churches which operate schools, including various members of the Synod and, in particular, St. John's."

9. In answer to the allegations contained in the first sentence of paragraph 15, defendants deny generally and specifically each and every allegation contained therein. In answer to the allegations contained in the second sentence of paragraph 15, defendants deny generally and specifically each and every allegation contained in line 21 thereof and allege in place thereof that "disability tax, except in certain estoppel situations, and disability tax information for the period. . . ."

10. In answer to the allegations contained in paragraph 16, defendants lack information or belief sufficient at this time to answer said allegations and upon that basis deny generally and specifically each and every allegation contained therein.

11. In answer to the allegations contained in the first sentence of paragraph 17, defendants lack information or belief sufficient at this time to answer said allegations and upon that basis deny generally and specifically each and every allegation contained therein. In answer to the allegations contained in second sentence of paragraph 17, defendants deny generally and specifically each and every allegation contained on line 11 thereof and allege in place thereof that "responsible for paying the tax, except in

certain estoppel situations for the period commencing. . . ."

12. In answer to the allegations contained in paragraph 18 and in each and every subpart thereof, defendants deny generally and specifically each and every material allegation contained therein, except defendants admit the material allegation contained in the first sentence thereof and further allege that the controversy also applies to "preschools."

CROSS-CLAIM FOR DECLARATORY RELIEF

COME NOW, defendants and cross-claimants, the State of California Employment Development Department and Martin Glick as Director of the California Employment Development Department (hereinafter referred to as the "cross-claimants") and for a cause of action against defendant and cross-defendant Raymond Marshall as Secretary of Labor of the United States (hereinafter referred to as the "Secretary"), allege as follows:

1. This is a civil action for declaratory relief seeking a declaration of the interpretation of Federal Unemployment Tax Act section 3309(b)(1) and California Unemployment Insurance Code section 634.5 as such sections apply to services performed for church-run preschools, elementary schools, secondary schools, colleges, or universities, including but not limited to, services performed for such nonprofit organizations as the Lutheran Church-Missouri Synod and St. John's Lutheran Church.

2. Jurisdiction is conferred upon this court under 28 U.S.C. section 1331 and 28 U.S.C. section 1441.

3. The Department is the duly constituted state governmental agency charged with the administration, imposition, enforcement and collection of taxes under the California Unemployment Insurance Code (hereinafter sometimes referred to as the "California Code") and was and now is subject to the control of its director, Martin Glick.

4. At all times material hereto, the Secretary was and now is a public official appointed by the President of the

United States and was and now is Secretary of the United States Department of Labor. The Secretary was and now is responsible for enforcing the conformity and compliance provisions of the Federal Unemployment Tax Act (hereinafter sometimes referred to as the "Federal Act").

5. The federal government collects unemployment insurance tax from specified employers pursuant to the Federal Act. In order to encourage States to adopt federal standards regarding, among other matters, which employees are covered by the State programs, as employer is allowed a credit against his federal unemployment tax for tax paid or which would have been paid but for a reduced State tax rate pursuant to qualified State programs. The California unemployment program is now and at all times material here to has been such a qualified State program.

6. Effective January 1, 1972 Congress amended the Federal Act to require each State, as a condition of tax credit against the federal tax for State unemployment insurance taxes imposed upon employers, to amend State unemployment insurance law to extend compulsory coverage to services performed by certain employees of nonprofit organizations pursuant to Section 104 of Public Law 91-373. Simultaneously, it set forth in section 3309(b) of the *Internal Revenue Code* several categories of employment which could be excluded from qualified State unemployment insurance coverage, including services performed:

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

"(3) in the employ of a school which is not an institution of higher education."

7. Effective January 1, 1972, California amended the California Code to extend unemployment insurance coverage to conform to Public Law 91-373, and to expand prior coverage of certain employees of nonprofit hospitals for disability insurance to cover the same employees for disability insurance as those newly covered for unemployment insurance. Simultaneously, it set forth in section 634.5 of the California Code several categories of excluded employment, including service performed:

"(a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

"(b) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.

"(c) In the employ of a school which is not an institution of higher education."

8. Effective January 1, 1978, Congress repealed the permissible exclusion contained in *Internal Revenue Code* section 3309 (b)(3) set forth above for service performed "in the employ of a school which is not an institution of higher education," while retaining the permissible exclusions contained in sections 3309(b)(1) and 3309 (b)(2).

9. Also effective for unemployment insurance tax purposes on January 1, 1978, and for disability tax purposes on April 1, 1978, California repealed the exclusion contained in section 634.5(c), for service performed "[i]n the employ of a school which is not an institution of higher education," while retaining the exclusions contained in section 634.5(a) and 634.5(b).

10. On April 18, 1978, the Secretary announced his decision that the deletion of section 3309(b)(3) meant that employees of church-operated schools could not be permissibly excluded from State unemployment insurance programs. A true and correct copy of the Secretary's decision is attached hereto, marked as Exhibit "A" and by this reference incorporated herein. This decision was formally communicated to States, including California, on or about May 30, 1978. A true and correct copy of this communication is attached hereto, marked as Exhibit "B" and by this reference incorporated herein. Since sometime after May 30, 1978, cross-claimants have been and are now presently attempting to collect unemployment tax as of January 1, 1978 and unemployment tax information for the claims filed commencing January 1, 1978, until the present, from churches which operate schools, including various members of the Synod and, in particular, St. John's, which churches have not withheld said taxes.

11. There is an existing and continuing controversy between the Secretary and cross-claimants as to the proper interpretation of the provisions of section 3309 (b)(1) and (2) of the Federal Unemployment Tax Act. Cross-claimants strongly support the principle of maximum extended coverage. Cross-claimants seek a declaration as to the proper interpretation of section 3309 (b)(1) and (2).

12. Cross-claimants interpret section 3309(b)(1) of the Federal Act to permit States to exclude from unemployment coverage:

a. Service performed by individuals in the employ of a church in any capacity in connection with the operation of any educational institution, including but not limited to, pre-schools, elementary schools, secondary schools, colleges, or universities;

b. Such services performed for a convention or association of churches.

13. Cross-claimants interpret section 3309(b)(2) of the Federal Act to permit States to exclude from unemployment insurance coverage service performed for any nonprofit organization by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order, even when the services are not performed in the employ of a church or any other organization described by section 3309(b)(1) of such Act.

14. The Secretary interprets section 3309(b)(1) and (2) of the Federal Act as requiring States, as a condition of allowance of tax credits under section 3304 of such Act, to extend compulsory unemployment insurance coverage by state law to employees of all nonprofit preschools, elementary schools and secondary schools, except that the following may be exempted:

a. Services for church schools preparing candidates for the priesthood, ministry, or rabbinate;

b. Services by church employees who perform strictly church duties pursuant to their religious responsibilities at church-run schools.

15. Pursuant to sections 3304(a)(6), 3304(c) and 3309 of the Federal Act, cross-claimants must substantially comply, and now are complying, with the Secretary's interpretation as to which services under such section 3309 must be covered by California for unemployment insurance, and which services may be permissibly excluded by California from unemployment insurance coverage. If the Secretary finds that California has failed to comply substantially with the Secretary's interpretation of such provisions, the Secretary cannot continue to certify section 634.5 of the California Unemployment Insurance Code for the purposes of allowing California employers the basic and additional tax credits against the federal tax imposed by the Federal Act. Thus, there is a continuing controversy between the cross-claimants

and the Secretary as to the proper interpretation of section 3309(b)(1) and (2) of the Federal Act and the derivative interpretation of identical provisions of section 634.5 of the California Code.

WHEREFORE, defendants and cross-claimants pray that:

1. The Court determine the rights and duties of the respective parties herein;
2. The Court interpret Federal Unemployment Tax Act section 3309(b)(1) and California Unemployment Insurance Code section 634.5;
3. The Court find that plaintiffs' First Amendment rights have not been violated;
4. Plaintiffs be denied a preliminary injunction and a permanent injunction;
5. Defendants be awarded their costs of suit incurred herein; and
6. The Court render such other and further relief as it may deem just, necessary and proper.

Dated: February 1, 1979

GEORGE DEUKMEJIAN,
Attorney General
PHILIP C. GRIFFIN,
LAWRENCE K. KEETHE,
Deputy Attorneys General

By /s/ Lawrence K. Keethe
LAWRENCE K. KEETHE

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UNITED STATES DEPARTMENT OF LABOR

Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-0162-MRP (SX)

THE LUTHERAN CHURCH,
MISSOURI SYNOD, ET AL., PLAINTIFFS

v.

STATE OF CALIFORNIA EMPLOYMENT
DEVELOPMENT DEPARTMENT, ET AL., DEFENDANTS

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, CROSS-CLAIMANT

v.

RAYMOND MARSHALL, as Secretary of Labor of the United States, CROSS-DEFENDANT

[March 26, 1979 at 10:00 a.m.]

NOTICE OF MOTION AND MOTION TO DISMISS

TO: PLAINTIFFS, THE LUTHERAN CHURCH-MISSOURI SYNOD, ST. JOHN'S LUTHERAN CHURCH, VIVADELL KEISER, AND THEIR ATTORNEYS OF RECORD, PAUL, HASTINGS, JANOFSKY & WALKER, BY DONALD A. DAUCHER; AND TO THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, AND THEIR ATTORNEY OF RECORD, DEPUTY ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, LAWRENCE K. KEETHE:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that on Monday, March 26, 1979, at 10:00 a.m., the Federal Defendant, Secretary of Labor, will bring on for hearing a Motion to Dismiss in the above-captioned matter. The hearing will take place before the Honorable Mariana R. Pfaelzer, United States District Judge, in her courtroom, United States Courthouse, 312 North Spring Street, Los Angeles, California.

This Motion is made pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, on the grounds that this Court lacks jurisdiction over the subject matter of this action.

This Motion is based upon this Notice of Motion, the Memorandum of Points and Authorities in Support of Federal Defendant's Motion to Dismiss, all pleadings, records, and files in this action, and any oral and docu-

mentary evidence that may be produced at the hearing of said Motion.

DATED: This 20th day of February, 1979.

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

By /s/ Stephen E. O'Neil
STEPHEN E. O'NEIL
Assistant U.S. Attorney

Attorneys for Federal Defendant.

PLAINTIFF'S EXHIBIT NUMBER 52

STATE OF CALIFORNIA

[SEAL]

OFFICE OF THE SECRETARY OF STATE

(PHOTOCOPY CERTIFICATION)

I, *EDMUND G. BROWN JR.*, Secretary of the State of California, hereby certify:

That the photographic reproduction hereunto annexed was prepared by and in this office from the record on file of which it purports to be a copy, and that it is full, true and correct.

IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this Mar. 25, 1971

/s/ Edmund G. Brown, Jr.
Secretary of State

[SEAL]

Filed June 24, 1970

ARTICLES OF INCORPORATION OF REDWOOD CHRISTIAN SCHOOLS

I

The name of this corporation shall be REDWOOD CHRISTIAN SCHOOLS.

II

The purposes for which this corporation is formed are:

(a) The specific and primary purpose is as follows:

1. To establish and conduct one or more schools of general education of a Christian character on an elementary and/or high school level.
2. To promote and/or foster and/or organize and/or supervise the type of schools specified in subparagraph 1. above.
3. The activities of the organization shall be conducted in accordance with fundamental Protestant concepts and shall be non-denominational in character.

(b) The general purposes and powers are:

1. To purchase, receive, take, acquire, hold, sell, convey or otherwise dispose of property whether real, personal or mixed.
2. To receive property by devise or bequest, subject to the laws regulating the transfer of property by will, and to otherwise acquire and hold all property, real or personal, including shares of stock, bonds and securities of other corporations.
3. To act as trustee under any trust incidental to the principal objects of the corporation, and

to receive, hold, administer, and expend funds and property subject to such trust.

4. To convey, exchange, lease, mortgage, encumber, transfer upon trust, or otherwise dispose of all property, real or personal.

5. To borrow money, contract debts, and issue bonds, notes and debentures, and secure same.

6. To contract and be contracted with.

7. To do all acts necessary or expedient for the administration of the affairs and attainment of the purposes of the corporation.

Notwithstanding any statement of purposes or powers aforesaid, this corporation shall not, except to an insubstantial degree, engage in any activities or exercise any powers that are not in furtherance of its religious, educational and charitable purposes.

III

This corporation is organized pursuant to the General Non-profit Corporation Law of the State of California.

IV

The county in this State where the principal office for the transaction of the business of this corporation is located, is Alameda County.

V

The names and addresses of the persons who are to act in the capacity of directors, until the selection of their successors, are:

Name	Address
WILLIAM J. BECKWITH	2137 Longview Drive San Leandro, California 94577
DONALD L. MADSEN	23098 Mansfield Avenue Hayward, California 94541
ADOLPH ODEGAARD	2187 Nina Street Hayward, California 94541

VI

The authorized number and qualifications of members of the corporation, the different classes of membership, if any, the property, voting and other rights and privileges of members, and their liability to dues and assessments and the method of collection thereof, shall be as set forth in the Bylaws.

VII

The property of this corporation is irrevocably dedicated to religious, educational and charitable purposes and no part of the net income or assets of this organization shall ever inure to the benefit of any director, officer or member thereof or to the benefit of any private persons. Upon the dissolution or winding up of the corporation its assets, remaining after payment, or provision for payment, of all debts and liabilities of this corporation, shall be distributed to a non-profit fund, foundation or corporation which is organized and operated exclusively for religious, educational and charitable purposes and which has established its tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. If this corporation holds any assets in trust, such assets shall be disposed of in such manner as may be directed by decree of the Superior Court of the county in which the corporation has its principal office, upon petition therefor by the Attorney General or by any person concerned in the liquidation, in a proceeding to which the Attorney General is a party.

VIII

The existence of this corporation is perpetual.

IN WITNESS WHEREOF, the undersigned, being the persons hereinabove named as the first directors, have executed these Articles of Incorporation, this 12th day of May, 1970.

/s/ William J. Beckwith
WILLIAM J. BECKWITH

/s/ Donald L. Madsen
DONALD L. MADSEN

/s/ Adolph Odegaard
ADOLPH ODEGAARD

STATE OF CALIFORNIA)
City and) ss.
County of San Francisco)

On this 12th day of May, 1970, before me, Alice H. Strayer, a Notary Public for the State of California, with principal office in the City and County of San Francisco, personally appeared WILLIAM J. BECKWITH, DONALD L. MADSEN and ADOLPH ODEGAARD, known to me to be the persons whose names are subscribed to the within Articles of Incorporation, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year first above written.

/s/ Alice H. Strayer
Notary Public

PLAINTIFF'S EXHIBIT NUMBER 60

22776

Redwood Christian Schools, Inc.
19300 Redwood Road
Castro Valley, CA 14546

NOTICE OF APPOINTMENT

To _____Date _____

are hereby notified that the School Board has appointed you to the position of _____ for a period of _____, beginning _____ at a salary of $_____ per _____ subject to any deductions normally made by the school.

The period of active duty is from _____ to _____.

The agreement to accept this appointment is subject to the policies and regulations of the School Board regarding cooperation with the administration, loyalty to the school and its mission, efficient performance of duties, worthy conduct, conformity to school standards, and adherence to the doctrinal position of the school. The School Board reserves the right to terminate this appointment at its discretion.

This notice is effective if signed and returned by _____.

_____
Chairman of the Board

_____
Administrator

ACCEPTANCE OF APPOINTMENT

I hereby accept the above appointment subject to the conditions stated above, and promise to serve wholeheardtedly in carrying out the duties attendant to this appointment. I agree, by God's help, to live an exemplary Christian life, to work cooperatively with staff

and administration, to conform to all school standards, and to adhere to the doctrinal statement of the school.

Signed: _____

Date: _____

Enclosed: Statement of Faith

Board Copy: Please sign and return Teacher's Copy: Please keep

STATEMENT OF FAITH
OF THE
REDWOOD CHRISTIAN SCHOOL

BASIS: The basis of the Redwood Christian School shall be the Bible as interpreted by the following statement of faith.

1. We believe the Bible to be the inspired and only infallible authoritative Word of God, and inerrant as originally received.
2. We believe that there is one God, eternally existent in three persons: Father, Son, and Holy Spirit.
3. We believe in the deity of our Lord Jesus Christ, in His virgin birth, in His sinless life, in His miracles, in His vicarious and atoning death through His shed blood, in His bodily resurrection, in His ascension to the right hand of the Father, and in His personal return in power and glory.
4. We believe that for salvation of lost and sinful men, regeneration by the Holy Spirit is absolutely essential.
5. We believe in the present ministry of the Holy Spirit, by whose indwelling the Christian is enabled to live a godly life.
6. We believe in the resurrection of both the saved and the lost; they that are saved unto the resurrection of life, and they that are lost unto the resurrection of damnation.
7. We believe in the spiritual unity of believers in our Lord Jesus Christ.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-3763

GRACE BRETHREN CHURCH,
ETC., ET AL., PLAINTIFFS/APPELLEES

v.

STATE OF CALIFORNIA, ETC., ET AL.,
DEFENDANTS/APPELLANTS

No. 79-3764

THE LUTHERAN CHURCH-MISSOURI SYNOD, ETC., ET AL.,
PLAINTIFFS/APPELLEES

v.

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT
DEPARTMENT, ETC., ET AL., DEFENDANTS/APPELLANTS

(1) STIPULATION FOR DISMISSAL; and

(2) ORDER OF DISMISSAL

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
STEPHEN E. O'NEIL
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1100 U.S. Courthouse
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Los Angeles, California 90012

Attorneys for Federal Defendant/
Appellant.

STIPULATION FOR DISMISSAL

IT IS HEREBY STIPULATED by and between the parties to this appeal, Federal Defendant/Appellant, United States of America, Secretary of Labor, and the Plaintiffs/Appellees, by and through their attorneys of record, that pursuant to Rule 42(b), Federal Rules of Appellate Procedure, the instant appeal be hereby dismissed, with the parties bearing their own costs. Counsel for Appellant has been informed by the Secretary of Labor and the Department of Justice, Washington, D.C., that the instant appeal should not be prosecuted at this time.

DATED: This ——— day of ———, 1980.

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U.S. Attorney
Chief, Civil Division

By _____
STEPHEN E. O'NEIL
Assistant U.S. Attorney

Attorneys for Appellant,
United States of America.

DATED: This ——— day of ———, 1980.

CALDWELL & TOMS

By _____
ERIC NELSON LINDQUIST

Attorneys for Plaintiffs/Appellees,
Grace Brethren Church, et al.,
in CA 79-3763.

DATED: This ——— day of ———, 1980.

PAUL, HASTINGS, JANOFSKY
& WALKER

By _____

DONALD A. DAUCHER
Attorney for Plaintiffs/Appellees
The Lutheran Church-Missouri
Synod, et al., in CA 79-3764.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-3763

DC# CV 79-0093 MRPfaelzer
C. Cal.

GRACE BRETHREN CHURCH, ETC., ET AL.,
PLAINTIFFS/APPELLEES

v.

STATE OF CALIFORNIA, ETC., ET AL.,
DEFENDANTS/APPELLANTS

No. 79-3764

DC# CV 79-0162 MRPfaelzer
C. Cal.

THE LUTHERAN CHURCH-MISSOURI SYNOD, ETC., ET AL.,
PLAINTIFFS/APPELLEES,

v.

THE STATE OF CALIFORANIA EMPLOYMENT
DEVELOPMENT DEPARTMENT, ETC., ET AL.,
DEFENDANTS/APPELLANTS

ORDER OF DISMISSAL

Having considered the Stipulation for Dismissal filed by the parties hereby pursuant to Rule 42(b), Federal Rules of Civil Procedure, the Court hereby dismisses the instant appeal.

The parties are to bear their own costs.

DATED: This 24th day of July, 1980.

/s/ Kathryn D. Freeman
Deputy Clerk

For: Richard H. Deane,
Clerk of Court

EXCERPTS FROM TRANSCRIPT OF TRIAL

AUGUST CHARLES ENDERLIN, III,

[7] called as a witness on behalf of Plaintiff Grace Brethren Church, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. Please state your true, full name and spell your last for the record.

THE WITNESS: August Charles Enderlin, E-n-d-e-r-l-i-n, the third.

DIRECT EXAMINATION

BY MR. BALL:

Q Mr. Enderlin, what is your residence address?

A 20197 Brittany Court, Castro Valley, California.

Q Are you married?

A Yes.

Q Do you have a family?

A Yes.

Q Would you tell the Court your educational background, please.

A I graduated from Ft. Wayne Bible College with a bachelor's degree. I have taken some other extended courses in state universities.

Q Will you tell the Court of your prior occupations.

A Post high school and up through about '60 I was [8] involved in construction work, et cetera. In 1963, which was during and post-college, I was involved as a minister of Christian education at a missionary church in Ft. Wayne, Indiana.

After that I was with another missionary church as minister of Christian education there.

After that I was involved in helping to establish and to form the Ft. Wayne Christian School in Ft. Wayne, Indiana.

After that in my present position at Redwood Christian School in Castro Valley, California.

Q Mr. Enderlin, what is your religion?

A I am a born-again, practicing Christian, a believer in Jesus Christ as personal savior.

Q Will you please state for the Court your essential religious beliefs.

A Yes. There are several that I would classify as essential.

One, I believe that the Bible is the infallible, inspired word of God.

I believe that there is one God who exhibits himself in three persons: God the Father, God the Son, God the Holy Spirit.

I believe in the Deity of Jesus Christ, his [9] virgin birth, and his sinless nature.

I believe in his death, burial, resurrection, his ascension to heaven, where he is now.

I believe in the salvation of the lost. Jesus said he came to seek and to save that which was lost.

Another would be the ministry of the Holy Spirit that I believe is evident in our world today. It dwells within the heart of the believer.

And probably not last but I will conclude with this: The spiritual unit of the believers, the body, of which those at Redwood Christian School are a part of that body of believers.

Q Now, what is your present occupation?

A I am superintendent of Redwood Christian School.

Q What does that job involve?

A It involves a multitude of things. It involves the oversight of the school as it would relate to public relations, getting the message out about the school; the delegation, the relegation of finances, expenditures, budget. It involves the hiring, the training, the overseeing of faculty, teachers' staff, all personnel within the school.

It involves the oversight of curriculum development; also involves facilities, care, maintenance, etc.

[10] Probably a multitude of other things, but that probably hits the highlight.

Q How long have you been superintendent?

A I have been with the school since its inception in 1970; that would be ten years. Titles have changed during the course of that time but I have been the chief executive officer.

Q Mr. Enderlin, why did you choose this field of work?

A I believe the Lord called me into a Christian vocation. This happened several years ago. As I was involved in working with a local church ministry there involved with its governing body, I felt the Lord speak in a very tangible way to direct me into Christian vocation, which at that time I started pursuing an education in that particular area.

Q When was Redwood Christian Schools founded?

A 1970.

Q Why was it founded?

A It was founded solely for religious purposes; to educate and to train young people in the tenants of faith which we espouse.

Q Are Redwood Christian Schools a part of any named local or national church?

[11] A Yes, if you consider the church as a body of believers, which we do. Body of believers is established by Jesus Christ and as identified in the New Testament.

Q Mr. Enderlin, how are Redwood Christian Schools financed?

A Financed in two ways: One, by tuition that the parents pay for the education of their children, and the second by gifts from believers, interested people in our educational program.

Q Are there racial restrictions on admissions?

A No, there are not. In fact, as all non-profit organizations must declare a nonracial, nondiscriminatory statement, we have done this. Our school right now has

a 13 percent minority ratio in comparison to the local school district which is 11½ percent.

Q Are your schools incorporated?

A Yes, they are.

Q When did that incorporation take place?

A June the 24th, 1970.

* * * *

[17] THE WITNESS: All right. We are to teach primarily, our objectives are that the parents, board's school, so forth, are to teach that Jesus Christ is Lord Savior; that the Scripture is essential in every part of our curriculum. That we are to teach that world missions, American heritage and so forth is a part of our curriculum.

We are to teach students to think for themselves and to stand up to their convictions under pressure.

Those would all be a part of that particular order.

BY MR. BALL:

Q Now, these objectives that you just summarized, do they play any role in the school's admissions policy?

[18] A Very definitely so. I am referring again to Article VI on policy No. E.

Q What does that say?

A It says the parents and children are expected to accept the objectives and other policies that are set forth by the board.

> "Failure to do so is justification for not accepting or for expelling a student."

Q Mr. Enderlin, do your schools admit children of other religious faiths?

A Yes, we do.

Q Now, do you in any way modify your religious teaching in order to accommodate the fact that these children are of a different religious faith?

A No, we do not.

Q Can you describe your schools in terms of internal appearance?

A We would have—I guess you are referring maybe to religious symbols and so forth that might be there. You see virtually everywhere Bibles, Christian flags. There would be references to the Scripture. There would be posters and so forth identifying them as a truly genuine Christian organization, religious organization.

Q Now, what about student behavior? Is that in [19] any way related to the religious mission which you say Redwood Christian Schools has?

A Yes.

Q In what way?

A We are teaching our young people self-discipline. We are teaching them self-control. We believe that this is an important measure for their developing in Christian conduct.

Much of this we would take from the Scripture, which is our authority.

In Matthew 16 it indicates the word to "deny self" as a part of the self-discipline process.

In Colossians 3 it indicates that what we do is to bring honor and glory to God. And in James I it talks about being obedient to that word, to those teachers, to those leaders.

Q Let me ask you about your extracurricular activities. Take the athletic program, for example. Does that in any way relate to religious mission of the school?

A We believe that our total program, from beginning to end—and if you want to identify that as "curricular," extracurricular activities would fall into that—it is a constant teaching mission.

With athletics, our teams are—our coach would [20] gather for prayer before games. There would be devotions, Bible study, as a preparation for this.

We are concerned that our young people learn sportsmanship with Christian character, and that is the reason for the Bible study.

We would be concerned that our young people would control temper, which we have seen by virtue of media that anger is one of those that seems to come out. We teach our young people to control their temper, even to the point of removing a student from a game. It could even be the expulsion from that team if it was necessary in a given situation.

Q What about other extracurricular activities?

A Other activities, one of the major emphases, I would say, in our school would be our music department. We have several choirs, and they fellowship with each other in this area. Our school is involved in singing. Not—well, we are singing as the Scripture indicates; psalms, hymns, spiritual songs and so forth.

There are obviously social activities surrounding those particular events. We believe that our young people need to be whole in every area, to conduct themselves as was previously mentioned in that Colossians passage, in whatever they do to bring honor and glory to Jesus Christ. [21] And so we afford them these extracurricular activities to help further their religious training.

Q Now, do the schools regulate the dress and the appearance of students?

A Yes, we do.

Q Why is that?

A Well, the Scripture indicates, particularly in the Book of I Peter, that we are to develop primarily inner qualities; qualities of love, joy, peace, understanding, temperance, so forth—these particular qualities, and not to pay particular attention to the outer, the way that a student dresses. We feel it is important to have some regulation in order to be able to put the emphasis upon these inner qualities that we are wanting to develop.

The Scripture also indicates in I Corinthians that our body is the temple of the Holy Spirit, the dwelling place of the Holy Spirit. And as such, we feel that it is important that we communicate a standard image within our institution.

Q Now, you have mentioned Bible. What role does the Bible play in Redwood Christian Schools?

A The Scripture is the very center of our curriculum, the very center of our school. And I guess I could best describe that as a wheel and the hub, the spokes going [22] out.

The Word, the Bible, is the hub; the spokes going out are the various aspects within our educational program, curricular or extracurricular. And the outer premise of that wheel encompasses our total educational program.

Q Your schools, Mr. Enderlin, teach secular subjects?

A There are no secular subjects.

Q Are not mathematics, for example, English, biology—those are also taught in public schools and secular or non-religious schools, are they not?

A They are. But if you take the premise from the word of God that all knowledge is from Him and that He is the creator of all, then everything that we learn is a revelation of God. Just because those subjects are taught in a secular school does not devoid them of godly content; they have only denied the author of that content. And this is done in a number of situations.

Q To your knowledge, do you teach these differently than the public schools?

A Well, by virtue of our identifying their coming from God, as such, we obviously would. They would not mention that God was the originator of these subjects, so forth. So yes, there would be that basic difference of [23] teaching.

Q Does California impose curriculum requirements on your schools?

A Yes, they do.

Q Do these California requirements provide that your schools teach any courses as secular subjects?

A No, they do not.

Q Now, if they did or if California were to require your schools to teach anything offensive to the school's statement of faith, what would your reaction be?

A We would have to refuse or to oppose that standard.

* * * *

[31] Q Now, let's talk about your employees. What religious qualifications, if any, must an employee of Redwood Christian Schools have?

A They must be a practicing, born-again believer in Jesus Christ, having a personal salvation in Him.

Q Does that apply to personnel other than teachers?

A It applies to all personnel within our school system, whether it is a teacher, administrator, secretary, bookkeeper, and aide, playground person, bus driver. They all meet the same basic qualification.

Q What specific qualifications must a teacher have?

A Okay. Beyond those which I have just mentioned, then they must be academically prepared in the academic discipline that they are going to be teaching. So if they are teaching history, English, whatever, prepared in that.

Q Now, these teachers at Redwood Christian Schools, [32] are they ministers?

A Yes, I would say that they are ministers, yes.

Q Are they ordained?

A They are not ordained.

Q Well, are they licensed as ministers?

A No, they are not licensed.

Q Are they commissioned as ministers?

A Commissioned? Yes, I would say that you could identify them as "commissioned."

Q In what sense do you mean that?

A Well, in the Scripture, Jesus Christ has commissioned us to go forth and to proclaim the word of God; to identify, to teach those particular areas.

I'd like to share, if I may, a couple of passages from the Scripture to identify that. Is that permissible?

THE COURT: Yes.

THE WITNESS: I'd like to direct the attention to Romans Chapter 15. I don't have these marked and I am a little nervous—14 through 16:

> "I myself must convince my brothers that you yourselves are full of goodness, complete in knowledge and competent to instruct one another. I have written you quite boldly on some points, as if to remind [33] you of them again, because of the grace God gave me to be a minister of Jesus Christ to the Gentiles with the priestly duty of proclaiming the gospel of God so that the Gentiles might become an offering acceptable to God, sanctified by the Holy Spirit."

That particular passage uses "a minister . . . . of God," which we believe is effective in this area of teaching.

Another one that I would like to refer to is I Corinthians, Chapter 12 and Verse 28. It says:

> "Are all apostles, are all prophets, are all teachers, do all work miracles. Do all have gifts of healing, do all speak in tongues, do all interpret, but eagerly desire the greater gift."

In other words, it lists in the Scripture those that are to perform the ministry of proclaiming the gospel of Jesus Christ.

Q These teachers, are they appointed to your staff?

A They are appointed by the school to minister religious education.

Q Now, Mr. Enderlin, suppose that a teacher of math in your schools performed excellently in that branch—punctual and diligent and so on—but told the students [34] that the Bible is not the infallible word of God.

Do you have the picture?

A Yes.

Q What would the school do?

A We would dismiss that teacher. It would be contrary to our statement of faith and the purpose for which we are established.

Q Now, suppose you have a married teacher at Redwood Christian Schools, completely proficient and also loyal to doctrine in the classroom but is known to indulge in public drinking of alcohol on his or her time off.

What would the school do?

A Our position would be the same in that area. We would dismiss that teacher in regard to unbiblical, unreligious conduct.

Q Now, suppose a less dramatic situation wherein a teacher, over a period of time, becomes lacking in Christian fervor in his or her relationship to the students.

What about that situation?

THE COURT: The question you are putting is that the teacher becomes lacking in Christian fervor?

MR. BALL: Yes, your Honor.

THE COURT: All right.

THE WITNESS: One of the missions of our—

[35] BY MR. BALL:

Q In relation to your students.

A One of the missions of our school is evangelism. This has been given in some of the Scripture references that I have indicated. A teacher that would not be involved in that evangelistic mission would be, to use that term, "cool in fervor," and that teacher would probably be asked to step down as not completing the requirements of our institution.

Q Now, is Redwood Christian Schools willing to have the state or government pass upon the question of whether any of those dismissals was justified?

A Absolutely not.

Q Why not?

A Because I don't believe that the government is qualified, to be very honest with you, to administer spir-

itual decisions. These would definitely be spiritual decisions based upon the word of God, based upon biblical tenets. I don't believe that there is a level of comprehension or understanding in these particular areas. They would be very foundational for us to have a drinking individual on our faculty.

Q Well, let us suppose the situation, however, where the government is not deciding whether that person is [36] on your faculty or off your faculty, but is in some way passing upon the question of whether the dismissal was justified.

A My answer would be the same. They are not qualified to do so.

Q Now, can you describe social relationships between students and among faculty and between persons connected with your schools generally.

A I'd say there would be a community of believers, a community of faith, a unit that would be there.

Q Do your schools participate in Social Security?

A No, we do not.

Q Do your schools receive any form of local, state or federal financial assistance?

A We receive none. By virtue of our board of directors, they made a decision we would receive no federal, state funds of any sort, which would include some of the very lucrative ones of audio-visual, food and so forth.

Q Why is that?

A Well, our basic premise is, by direction of the board of directors, that if we were to receive certain funds that there would also come certain controls attached to them. We are of the persuasion that we want to respond according to the word of God and not a nonbiblical, [37] non-religious entity.

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[38] BY MR. BALL:

Q Mr. Enderlin, is chapel conducted in your schools?

A Yes, sir.

Q Would you describe your chapel operation.

A Each one of our schools has a separate chapel for elementary, junior high, high school. These would be conducted on a weekly basis for a formal total school chapel of which Scripture, singing and the presentation from the Word challenging students to godly living would be given. It takes a little different form than our daily [39] Bible class where there is a specific time of instruction in the word of God which would involve memory, et cetera.

The chapel time is one that is trying to inculcate a desire, an emphasis on the part of that student to live what he has been learning in his head. It is an emphasis to the heart.

Q Let me ask you this: During your conducting of classes at Redwood Christian Schools is there any kind of moral or religious instruction that accompanies the life in the classroom?

A That would be constant. Moral instruction would not only be in the Bible class but reading, history, all of those courses would include instruction in that area.

In fact, one of the things I think to our chagrin is that much of the reading material that is given to young people today leaves off that moral climax, that moral lesson. They are left to hang and decide for themselves, which they are incapable of doing that.

Q What about excuse me; go ahead.

A So that each of our classes are leading to moral implications for our students.

Q Does your school have any code of conduct?

A Yes, standard of conduct. It would be similar, as we previously mentioned the dress code. There are [40] standards that students—I guess you are meaning raise their hand to respond in class; that is a part of self-control that we are talking about. There are common courtesies that we are trying to espouse to our students, particularly as it relates to boy-girl relationships.

I believe that the Scripture teaches that men are to honor women as women, and so these would be common courtesies that would be taught throughout the course of the entire day as well.

Q Are you suggesting that the rules of conduct and discipline in the schools are religiously based?

A Yes, they are.

Q Now, I wanted to ask you about the minimum wage laws. Does Redwood Christian Schools comply with the minimum wage laws?

A I'm not aware that we must comply with those laws, though we have heretofore paid a wage that was above those particular wage standards. We have been able to do that probably on the basis of having a number of volunteer people that come in—parents, etc.

I was calculating the other day. We are probably given more than a thousand hours per month by these people. I am a little concerned, to be very honest with you, as those minimum wage laws continue or standards continue to climb, that it may put us into a very uncomfortable position. Thus far, we are all right.

Q Have you been subjected to inspections under the minimum wage laws?

A No, we have not yet, but I understand that that possibly could be, and also there could be accounting forms, reporting, all of which gives concern to me because that chews up dollars that are precious in our particular situation.

Q Now, you mentioned volunteer unpaid help. Am I correct on that?

A Yes.

Q That was in response to my last question. Is this to any substantial degree within the school?

A Well, as I mentioned, probably over a thousand hours. There are many people that are giving time, instructional aides within the classroom. We have coaches that volunteer their time; addressing, mailing, typing—just a host of things.

Q Why is this help afforded, to your knowledge?

A Well, primarily because our parents are aware that—well, they are paying tuition. Many of them are really struggling to pay. And we have indicated that the more help we can get, the more subsidy in this area, to [42] that degree we will be able to keep those tuition costs down. And so many of them are very ready to come and to volunteer their time in order to keep that tuition at a low level.

Q Is your school involved in workman's compensation?

A Yes, we are.

Q Does this present a problem to you?

A Well, it does remove the financial burden, the liability on our school right now. Thus far, it has not presented any major imposition on our program. I am a little concerned in regard to its far-reaching implications to the future; that is all I can say at this point.

Q Now, in 1974 the Congress enacted the Federal Emergency Jobs and Unemployment Assistance Act. Under that it created a program known as SUA, or Special Unemployment Assistance program.

Did your schools participate in SUA?

A No, we did not, and I am not even aware of that program, to be honest with you.

Q All right. Now Mr. Enderlin, Redwood Christian Schools is a plaintiff in this case; is that correct?

A Correct.

Q Why is Redwood Christian Schools a plaintiff in this case?

[43] A We are opposed to the federal and the state government imposing a tax on our school.

Q Can you specify in any more detail why you are opposed to this program?

A Yes, I'd like to give several reasons for that.

Q Please.

A First, I believe that it would be improper for the government to decide whether it was justified for an

employee to be dismissed from Redwood Christian School. Many of these areas would be moral/immoral issues of which, as I say, they are not qualified to govern.

It would almost seem in this area that it would be the state Department of Labor versus the word of God, because this is ultimately where we take our decision and our position for dismissing a student.

I do feel also within this same area that the Department of Labor could impose upon us the responsibility to pay the wages, the unemployment wages, for a dismissed employee, dismissed wholeheartedly on the basis of the word of God from our standpoint but obviously, in the light of the state Labor Department, wholly an unworthy reason in their eyes.

Another reason that I would like to give is that it's been said over and over again that we are not a church; [44] we are a ministry. Therefore, we are subject to pay taxes.

I just find this wholly incongruent because we are a ministry. We are a religious institution.

Just recently we received notification from the Secretary of State that confirmed what we have been saying all along: that we are religious. The Secretary of State in the new non-profit corporation reclassification has classified us as "religious" and put us into a similar classification as churches.

Another area that is very important to us would be the area of financial. Our institution, as I mentioned previously, is supported by tuition and gifts. Tuition obviously is a charge imposed upon our families. Gifts are strictly voluntary. We have limited funds and limited resources.

The state Department of Labor indicates that a teacher, if they go to the maximum of claim benefit, can receive up to $8,000 within the course of a year. To me, $8,000 is a considerable amount of money.

If you happened to have two or three of those in the course of a year, it could be catastrophic for us.

One of the things that is also imperative, along with this area of finances, is those costs, whether it is $8,000 or sixteen or whatever; those costs, those moneys [45] have got to come from somewhere. We have no other alternative but to pass that along as increased tuition to our parents that are in the school. Inflation is catching many of them in a spiral to where they are having to really sacrifice in order to meet the current tuition that we have. This would be an added burden.

Within this area of financial I am familiar with two ways that we can finance unemployment, and both of them have their problems.

One is the reimbursable method. This probably would be the one that we would elect to go on, if that decision had to be made here today. That would mean that in a given year we would have to pay exactly the claims that were put to us, which could be one teacher—$8,000, as I have already mentioned, on up.

The other way is to take the tax formula method, which is about 3 percent of total wages. Based on our budget for this next year, that would be about $30,000 that we would have to budget in our current budget coming up for this next year. $30,000 is a lot of money to add to tuition for these already overtaxed parents.

Needless to say, finances is a major, major consideration.

Another area that I would like to express is [46] that I am opposed to the government reaching into the religious community. And I think that would be in the form of a forced program of which this would be one. That would take the form of the employee being notified that if he or she was discharged, the government could ultimately decide whether that firing, dismissal was justified.

I believe this conditions that employee to certain unfavorable situations as far as we are concerned. I also feel that that puts the government into the employment relationship with a religious organization. I would be opposed to that.

Another that I feel is important is that a religious institution should not be helping to fund secular and/or government employees. And I make that statement on the basis that if we would elect to go to the tax rate unemployment fee structure of 3 percent, and if based upon our previous track record we had had no employees dismissed or fired because of unbiblical, unscriptural teaching, we could be contributing $30,000 or more per year based upon budget costs, which none of those funds are returned to us. Those would all be going into then supporting non-religious programs of that nature and would ultimately be doing so through the tuition and the gifts of the believers within our school, our community of believers.

* * * *

[83] ROUSAS JOHN RUSHDOONY,

called as a witness on behalf of Plaintiff Grace Brethren, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. Please state your true, full name and spell your last for the record.

THE WITNESS: My name is Rousas, R-o-u-s-a-s, John, Rushdoony, R-u-s-h-d-o-o-n-y.

DIRECT EXAMINATION

BY MR. BALL:

Q What is your residence address, Dr. Rushdoony?

A I live in Vallecito, California; V, as in Victor, -a-l-l-e-c-i-t-o; P.O. Box 158.

Q Dr. Rushdoony, what is your religion?

A I am a Christian. My background is the Church of Armenia. My ministry has been Presbyterian and Anglican.

Q Now, would you please describe to the Court your professional background.

A My professional background includes missionary work among the Chinese Americans of San Francisco,

the Paiute and Shoshone Indians, work with the William Volker, V-o-l-k-e-r, Fund and Educational Foundation as an independent consultant; staff member of the Center for American Studies, and for some years now staff member and president of [84] Chalcedon, C-h-a-l-c-e-d-o-n, Foundation.

I am the author of around thirty or so books, numerous articles; have been the recipient of a couple of research grants and so on.

Q Would you describe to the Court, please, your educational background.

A My educational background is: B.A., M.A., PhD and B.D., bachelor of divinity.

Q Would you identify the scholarly books and principal articles which you have made reference to.

A Most of the books have been scholarly. One of those in the field of education or the history of the philosophy of education; it was entitled *The Messianic Character of American Education*, which traced all philosophies of education in this country from Horace Mann to the present. That is, public education.

Q When was that published, Doctor?

A I believe that was published in 1963 and has been continuously in print since then in numerous printings.

Q Have you published other scholarly books?

A Yes. Among them, for example, in the field of philosophy, *By What Standard*, *The One and the Many*, *The Word of Flux*, which is in the field of epistemology.

Then I have also written *Institutes of Biblical* [85] *Law*, which is in use in some law schools today.

I have also written a number of other works. For example, *The Foundations of Social Order*. A great many more.

Q Yes, sir. Now, Doctor, what is your principal field of scholarly endeavor?

A Although I am a member of the Society of American Church History, my primary interest has been with the history of ideas, philosophy and theology, and related areas of disciplines.

Q Are you familiar, Dr. Rushdoony, with the issues in this case?

A Yes, I am.

Q Have you read the complaint in this case?

A Yes, I have.

Q Now, the individual plaintiffs in their complaint, the various plaintiffs assert that they are of the Fundamental Christian faith. Now, as a specialist in the field that you have described, can you explain to the Court what is meant by "Fundamentalist Christian Faith"?

A Yes. It would be possible to go back, and properly so, to the Old Testament to explain it.

But the most recent aspect of the history dates from the 1890's when a group of scholars at various schools, [86] the Old Princeton and elsewhere, came together to assert in the face of the growing invasion of the churches by humanism, what they called the "fundamentals of the faith," the fundamentals of historic orthodoxy.

These papers were published in a series of five paperbacks and subsequently reprinted in one volume. They dealt with such matters as the infallibility of Scripture, the Deity of Christ, the Trinity, the atonement and so on.

As a result of those papers, a group of people—and not as an organized movement but as groups here and there all over the country—began to withdraw from the existing churches to establish independent churches. And they added to these fundamentals as their basic conviction the necessity for regeneration: to be "born again Christian."

From about 1900 to approximately 1950, Fundamentalism was in the process of church formation of separation so that the great key word in that half century in Fundamental circles was separation"; separation from the world, separation from modernists or humanistic churches

About 1950, give or take a year or two, these Fundamentalist churches then began to concern themselves

with the life of the faith. They began to recognize that the world around them was, even as the churches they had left had been. So they began with a kind of gut feeling, [82] and many of them cannot articulate their reasons too well, to recognize the need to create their own society, their own institutions. So they began to create schools and the beginning of this Christian school movement outside of the traditional parochial school groups—Catholic, Dutch or Christian reformed and the Lutheran and Seventh Day Adventist is a fourth.

The beginning of this tremendous growth, a burgeoning of this Christian school movement was approximately 1950. With it, as a part of creating the Fundamentalist parish or community, went also related activity so that you have, although the Christian school movement has been primary, the creation of homes for delinquent children, the creation of homes for the elderly, the creation of new institutions for a separated society.

Q Now Doctor, will you please tell the Court what is meant by the term "church" in Fundamental Christianity.

A The term "church" is a very interesting one and, unhappily, a confused one because of an accident in the English language. We have the word "church" or "Kirk," which comes from the Greek "Kyriakon Doma"; K-y-r-i-a-k-o-n, and then Doma is a second word, D-o-m-a, as in "domicile." It means "house of the Lord." "Kyrios," Lord.

Now, that term came into being in the early [88] centuries, after about the 5th, 4th century, approximately, when church buildings were created.

And from "Kyriakon Doma," especially from "Kyriakon," "Kirk" and "church" developed, which unhappily refer to the building or the institution.

However, in the New Testament the word which is translated into English as "church" is "ecclesia," e-c-c-l-e-s-i-a. Now, "ecclesia" we find in the Septuagint or the Greek version of the Old Testament, translated for the Hebrew of "Quhal" and "Edah."

The best way to explain it is to say that the term in the Old Testament which meant "Israel" as the covenant people of God is what is meant by "church." We find therefore in the patristic literature, and it is summarized in Bingham's *Antiquities* of the Christian Church, which is a summary of all the source materials of patristic literature, that the "church" meant, in the early church and in the New Testament, the worshipping body, or what James in his Epistle 2:2, I believe, translated into the English as "assembly," renders in the Greek as "synagogue," so that the place of worship was called the "Christian synagogue."

Then, however, the church was also a school from the very beginning, because in the Old Testament the [89] ministry was twofold: a sacrificing priesthood, and then a Levitical ministry. And Deuteronomy 33:10 specifies that the foundation of the Levites is instruction.

Well, the priesthood ended in the church because our very English word "priest" is not related to the "Cohen" of the Old Testament but is rather an abridgement, as an unabridged dictionary will tell you, of "Presbyter," or "elder."

Now, the ministry in the New Testament, both in the synagogue and in the school, was Levitical; that is, instructional. And you find that a library, a school and a church or "synagogue," as they would say, constituted the covenant community or church. It is also spoken of in the New Testament as the "Israel of God." That is, the New Israel, the New Testament.

* * * *

[96] Q Now, what is the status in fundamental Christianity of a Christian teacher in a church school, in a [97] Christian school, in relation to the church?

A He is comparable to a minister or a missionary or an evangelist.

Q Do you agree with the testimony you heard from Mr. Enderlin that their teachers are ministers in the exercise of their ministry?

A Mr. Enderlin cited I Corinthians 12:28 wherein Paul says, "The ministry of the church consists of . . .," and names, among other things, teachers.

This has been a longstanding view within the Christian church. A conspicuous example of the application of this comes from the Middle Ages when the scholars of the University of Paris corrected Pope John XXIII, who was later declared an antipope, and they spoke as the church to the supreme pontiff.

Q Then you would agree with his statement; is that correct?

A Yes.

Q Now, in the Fundamentalist view, are there any secular subjects of teaching?

A No, there are not.

Q What role, if any, do religious schools, Dr. Rushdoony, have in fundamental Christianity with respect to the Fundamentalist faith community?

[98] A Their role is very basic to the impetus that created them, which I said in the first half century of their growth was separation from modernism.

Now that doctrine of separation is being carried a step further and it is being applied in the area not only of worship but of schooling.

* * * *

[153] ERNEST L. CARTER,

called as a witness on behalf of the federal defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. Please state your true, full name and spell your last for the record.

THE WITNESS: Ernest L. Carter, C-a-r-t-e-r.

DIRECT EXAMINATION

BY MR. SHEINFELD:

Q Mr. Carter, could you please indicate to the Court what your address is and your present occupation.

A 1836 Metzerott Road, Adelphi, Maryland. My present occupation is unemployment insurance specialist.

Q By whom are you employed?

A Department of Labor, Employment & Training Administration.

Q Mr. Carter, could you indicate to the Court some of your educational and work background. Why don't you [154] begin with college.

A I graduated from Wayne State University in Detroit, Michigan in 1978—I'm sorry; '58.

I taught in Detroit, Michigan for approximately five years. I then worked for the New York City Department of Social Services for one year. Beginning in 1964 to 1978 I worked for the New York State Department of Labor as a claims examiner, local office manager, senior claims examiner. For the last year—

Q Let me stop you a second. That was with the state Department of Labor in the unemployment insurance area?

A Yes, it was.

Q Go on.

A In January, 1979 I became employed with the U.S. Department of Labor, Employment and Training Administration, in my present job.

Q What is the nature of your present job, Mr. Carter?

A I am an unemployment insurance program specialist and I furnish technical assistance to the states interpreting federal law, federal requirements in unemployment insurance.

Q Which particular aspect of the unemployment [155] insurance claims process are you involved in?

A Non-monetary determinations. That is, determinations of eligibility under state law regarding discharges, refusals of employment, those elements.

Q So your employment involves the claims adjudication prior to hearing?

A Yes. It is "hearing" with a small "h." Predetermination proceedings.

Q So these are the initial determinations made at the local office.

A Yes.

Q What is your precise present assignment? What are you working on now?

A I am working on the trainer package, to train non-monetary determination adjudicators in the local office, starting next week. It is about thirty employees of state agencies. I will be attending this training course in Camp Springs, Maryland. I am conducting the course.

Q What will you be training these people in?

A Fact finding, decision making, interviewing techniques, training techniques and then the issues: Voluntary leaving, misconduct, refusal, and able and available for work.

Q Let me ask you, Mr. Carter: Are you familiar [156] generally with the issues surrounding the coverage of elementary and secondary school employees under the 1976 amendments to FUTA?

A Yes.

MR. SHEINFELD: Your Honor, I would request at this time that Mr. Carter be accepted as an expert witness on the issues of the requirements of federal law with respect to initial determinations under the Federal Unemployment Tax Act.

THE COURT: Do you have any objection to that, Mr. Ball, Mr. Daucher?

MR. BALL: Yes. Objection, your Honor. As I understand what is needed for qualification of an expert witness, it is far more than what has been shown in the case of this witness. He has, obviously, a routine familiarity with a federal job which he holds. But whether that is expert testimony I would very seriously doubt.

He shows a relatively short career in this present employment. There is nothing that indicates any specialized competence, any kind of publication, anything of the kind that would show that he has an unusual degree of information that would qualify him as an expert before this Court.

MR. SHEINFELD: Can I respond to that, your [157] Honor?

THE COURT: Just a minute.

MR. DAUCHER: I too believe it is early to qualify the witness as an expert. I think I know what the witness is going to testify regarding as an expert, and I think there are other questions that have to be answered before he can testify as an expert on those areas. I don't want to suggest those questions to the federal government, other than to say that there's been no showing at the present time regarding any experience that this witness has had in the area that we are concerned with here.

MR. BALL: Your Honor, if I may add one thing. Furthermore, he is an employee of the defendant in this case.

THE COURT: Well, that goes to his bias. I don't see any reason why he can't be an expert but I think you have to ask him some further questions.

BY MR. SHEINFELD:

Q In the course of developing your training program, has it been necessary for you to become familiar with the issues involving the adjudication of claims based on discharges for misconduct?

A Yes.

Q How have you become familiar with the adjudication [158] of such claims?

A First, I have approximately fourteen years in the State of New York, either supervising the adjudication of such claims or evaluating the correctness of these determinations in the local office.

THE COURT: What kind of training did you have for that job in New York?

THE WITNESS: I had originally a claims adjudicator's training by the State of New York.

THE COURT: What does that consist of?

THE WITNESS: That consisted of classroom training, I would say about three weeks of classroom training, and then on-the-job training for about six months.

THE COURT: Go on with the questions.

BY MR. SHEINFELD:

Q After you left the State of New York after fourteen years of examining and adjudicating claims, what have you done in your employment with the Department of Labor in this regard?

A Well, in making a course I had to set up hypothetical separation cases, role playing. First I had to establish what are the elements that you must penetrate in each discharge for misconduct. And generally there are four elements. There is the claimant's act and its effect [159] upon the employer; what the condition of employment or work rules were; the employer's efforts to prevent or control the act or actions, and it can be an omission also; and finally, the claimant's efforts to control or prevent the act or omission that causes discharge.

THE COURT: Who trained you in your present job?

THE WITNESS: In my present job?

THE COURT: Yes.

THE WITNESS: My supervisor, Mr. Ed Curley.

THE COURT: So when you first came to the department, what kind of training were you given?

THE WITNESS: It was on-the-job training that I was given.

THE COURT: All right. Go on.

BY MR. SHEINFELD:

Q During your career, both with the state and federal governments, can you estimate in any way how many claims you have examined which raise the issue of discharge for misconduct?

A Well, it would have to be hundreds. It is hard. If you are a working examiner, you would interview about

fourteen people a day on issues, and maybe ten of those would be separation issues.

Q It was your job to make determinations as to [160] whether those discharges were for misconduct and the circumstances under which those discharges took place?

A Yes, under Article 18 of the New York State labor law; that is the unemployment insurance law.

Q Let me get into a slightly other area for a second. What is the relationship between your office and your operation, and the operation of the state unemployment insurance agency, such as the State of California's?

A It is a federal-state program and the secretaries of labor have standards in terms of determinations and standards in terms of notice determinations, so it is a cooperative program, the unemployment insurance is. The states are required to administer the unemployment insurance programs to assure a payment of benefits when due, and so the "when due" means correctly under state law and also in terms of timeliness.

So there is the fairness in terms of how the determinations are arrived at; there are standards for that. There are timeliness standards in terms of how long it takes to make a determination, and there are accuracy standards.

Q So it is the job of your office to ensure that the state agencies comply with the federal standards in those areas?

A Yes.

[161] Q Is the objective of your training program to set forth to the state agencies precisely what the federal standards are in these areas?

A That is part of the training, yes.

MR. SHEINFELD: Your Honor, if I could again make my motion and modify it only slightly: To the extent that we present Mr. Carter and the next witness to establish what the Department of Labor believes is required under federal law to adjudicate claims under

FUTA, we believe that is a relevant issue in the case since the plaintiffs are seeking to enjoin the application of the federal statute by the federal defendants.

We believe that Mr. Carter is an expert on what the federal standards are and what is required.

THE COURT: No, he is an expert. He might be an expert or he might be qualified to testify as to what interpretation the department puts on a particular matter, but we know what that is already, don't we?

MR. SHEINFELD: But Mr. Carter's expertise extends beyond that to exactly how the Department of Labor believes specific claims should be adjudicated and how those adjudications—

THE COURT: Not how the Department of Labor believes it but how they do adjudicate; isn't that what he [162] is going to testify to?

MR. SHEINFELD: Yes, your Honor: how these adjudications—

THE COURT: How they do adjudicate.

MR. SHEINFELD: Absolutely, your Honor.

THE COURT: All right.

MR. DAUCHER: Your Honor, I would like to take the witness on voir dire for a moment.

THE COURT: Yes.

MR. DAUCHER: I would like to ask that Mr. Streett be excluded from the courtroom while that takes place.

THE COURT: Fine.

Mr. Streett, will you go outside.

(Mr. Streett leaves the courtroom.)

VOIR DIRE EXAMINATION

BY MR. DAUCHER:

Q Mr. Carter, would you explain to me the meaning of "hearing" with a small "h," and "Hearing" with a large "H" in connection with the unemployment insurance claims determination process.

A "Hearing" with a small "h" is a predetermination process in the local office. The claimant and the em-

ployer are not permitted to cross-examine each other. It is a [163] fact-finding process where the interviewer or claims adjudicator attempts to elicit information from each, the employer and the claimant, to make a determination under the law.

The employer is not necessarily required to be at this predetermination proceeding but he has an opportunity to appear at that proceeding.

Q Are any rules of evidence applied in such a hearing?

A You mean formal rules of evidence as in a law court? No, sir.

Q What was the extent of your participation in what you call "predetermination hearings," hearings with a small "h"? Do you understand my question?

A Yes, I do. For seven years I conducted such hearings. Then I became a senior claims examiner and I supervised ten to twelve other adjudicators who made and conducted these hearings.

Then as a manager for two years I was also responsible for the quality of the work out of the local office which also involved making these determinations.

THE COURT: That is in New York?

THE WITNESS: Yes, it is in New York.

[164] BY MR. DAUCHER:

Q Seven years where you conducted the hearings yourself? How many years did you supervise others conducting them?

A Another seven years.

Q Then you say two years you were a manager?

A Yes, I was responsible for the management of the local office.

Q What is a "Hearing" with a large "H" in the unemployment insurance context?

A A hearing with a large "H" is a hearing in which the claimant and employer may bring counsel. Testi-

mony is taken under oath. It is a more formal proceeding.

The claimant has the right to cross-examine the employer and his witnesses, and vice-versa.

Q Do the rules of evidence apply?

A Not the same rules of evidence. Administrative rules of evidence would apply; they are not the same as criminal rules of evidence.

Q During the time you were with the State of New York did you have any experience with hearings of the large "H" variety?

A Yes. Oftentimes when there was a controversy about what local office procedure was or what someone had [165] been advised, they would require a local office person to come and testify at such a hearing.

Q Did you ever conduct such a hearing yourself?

A No, I did not, sir.

Q Going back to the hearings of the small "h" variety, the informal meetings where the employee was normally present, the employer could be present at the predetermination hearing, during the seven years that you conducted these hearings did you ever conduct one of these hearings regarding a religious secondary, elementary school?

A No, sir.

MR. DAUCHER: No further questions.

THE COURT: All right.

Mr. Sheinfeld.

MR. SHEINFELD: As I indicated, your Honor, it is our intention to offer Mr. Carter's testimony on the question of the nature of the federal standards for the adjudication of hearings with a small "h."

We do have Mr. Streett who will testify in the same regard to the hearings with the big "H."

THE COURT: All right. Yes.

MR. DAUCHER: To the extent that Mr. Carter's testimony is confined to hearings with a small "h," and to the extent that Mr. Carter's testimony is confined to

[166] general standards and not specifically to religious elementary and secondary schools, and the process which might be undertaken in those schools, we have no objection to the testimony as expert testimony.

However, I think we would have an objection as to the relevance of such testimony if it didn't pertain to what standards would be applied in a hearing regarding religious elementary and secondary schools.

THE COURT: Well, Mr. Daucher, I will let the witness testify and we will see how these questions come out.

If I understand his testimony thus far, he has not been ever involved in a hearing regarding a religious school.

Is that right?

THE WITNESS: No, you are right about that; yes.

THE COURT: All right.

MR. SHEINFELD: Your Honor, there was no coverage of these schools at the time that he was employed, so—

THE COURT: I understand, I understand.

Go ahead. It depends somewhat on the way you ask these questions. Go ahead.

MR. SHEINFELD: Well, your Honor, what I intend to do—

[167] THE COURT: Don't tell me what you intend to do; do it.

MR. SHEINFELD: Just do it? Okay.

DIRECT EXAMINATION (Resumed)

BY MR. SHEINFELD:

Q Mr. Carter, let me pose to you a hypothetical question involving a set of facts and ask you based on your background and experience how you believe that case should be adjudicated under the federal standards.

I use as an example a hypothetical that was posed yesterday by counsel for the plaintiffs. If there is a teacher in that school and that school believes and maintains as a tenet that the Bible is the direct and absolute word of

God, and if that teacher, who happens to teach mathematics, in the course of his instruction tells his students that the Bible is not the direct word of God and that teacher is subsequently discharged, in your opinion can the state agency make an initial determination of eligibility without examining the correctness or sincerity of the church's belief in the source of the Bible?

MR. DAUCHER: We will object to the question on the grounds previously stated: that the witness has no expertise with respect to whether or not such a determination [168] can be made without making a determination of religious doctrine.

MR. BALL: Excuse me, your Honor. We would object to the question on the basis of the fact that it was completely unclear as to what is meant. The question, as I understand it, is: Can the hearing examiner make a determination.

THE COURT: I think you are correct about that. That question is not a good question.

Will you reframe it, please.

BY MR. SHEINFELD:

Q Mr. Carter, do you remember the hypothetical as I posed it?

A Yes.

Q Let me ask then the question—

THE COURT: Let me remind you of what the hypothetical is.

You have a teacher in a religious school. One of the tenets of the school and the teaching of the school is that the Bible is the word of God. The teacher is a math teacher. The teacher in the course of teaching the math class tells the students that the Bible is not the word of God and is discharged for that.

Do you have that in mind?

[169] THE WITNESS: Yes, I have that in mind.

THE COURT: All right.

BY MR. SHEINFELD:

Q Mr. Carter, under the appropriate federal standards, should that discharge be adjudicated without reference to the school's belief in the nature of the Bible?

A In order—

MR. BALL: Objection again, your Honor. That question is not clear. "Adjudicated without reference to the school's belief"—this was not a part of any hypothetical that I posed.

THE COURT: All right. Let's ask the question differently.

How should that matter be adjudicated in a hearing, small "h" hearing, in your opinion?

THE WITNESS: First, if there was a violation of a rule or a standard of conduct that the employer had a right to expect from an employee, was this a condition of his hire when he was hired, that he not undermine the employer or make acts that were, commit acts that were detrimental to the employer's interests.

If there was that understanding and it was part of the contract of hire that this was a religious school and that then if he knowingly made a statement harmful to [170] the employer's interests, it would be adjudicated—it could be adjudicated, yes.

BY MR. SHEINFELD:

Q Would that discharge be considered a discharge for misconduct?

A Yes. If he willfully violated his contract of hire and committed an act harmful to the employer's interests, it would be construed as misconduct; in keeping with state law, of course.

Q Does that contract of hire have to be in writing?

A No, that can be an oral contract of hire.

Q And the conditions of employment that might subsequently result in a discharge for misconduct could also be oral?

A Yes.

Q Let me pose to you a second hypothetical.

THE COURT: Excuse me just a minute. What you are saying is that you, in your small "h" hearing, would first ascertain whether there was an understanding on the part of the employee that as part of his contract of hire he was not to say to the students that the Bible is not the word of God. You would be looking to see if he understood that as part of the conditions of hire?

THE WITNESS: Yes, that would be so. That would [171] be so.

THE COURT: All right. Go on.

BY MR. SHEINFELD:

Q I would like to pose to you, Mr. Carter, another hypothetical that was raised yesterday. Let's keep with the same teacher, but this time the teacher is discharged because it was determined that he was drinking off the job, contrary to the rules and regulations of this school.

How should such a discharge be adjudicated?

MR. BALL: Objection, your Honor. The hypothetical to which Mr. Sheinfeld refers, which I presented yesterday, did not specify rules and regulations. It merely said that the person was observed having that sort of conduct.

THE COURT: You will have to change it. That is exactly what Mr. Ball did say.

BY MR. SHEINFELD:

Q Mr. Carter, in the case of a teacher who was discharged from his employment for drinking, how would such a claim be adjudicated?

THE COURT: Mr. Sheinfeld, I don't want to interrupt you again. The hypothetical or the situation that was put was, "drinking in public, observed drinking in public."

[172] BY MR. SHEINFELD:

Q Mr. Carter, in the case of a teacher in a church-related school who was discharged when it was observed that he was drinking in public, how should that type

of claim be adjudicated, based on the federal standards as you understand them?

A First, the claimant—the local office would be obliged to allow the claimant to give his version of the incident. I don't know whether you are saying this "observe" as a fact or not. But if this is a fact, again, although it is not in connection with employment, it would depend again on the nature of the employer's business.

Usually acts of misconduct happen in conjunction with employment. But if the employer's business is such that an act away from the job reflected upon the employer's reputation, then that could be construed as an act of misconduct.

MR. DAUCHER: Excuse me a moment, your Honor. May I ask that the witness' answer be read back so that I could take it down?

THE COURT: Yes, yes.

(Record read.)

BY MR. SHEINFELD:

Q Mr. Carter, could you expand for a moment on [173] what you mean by "if it reflects on the employer's business."

A I didn't mean any pejorative reference to the church as a business, but a brokerage house, for example, or bank may have standards of conduct for employees that would not be expected for someone who had public contact; for example, who repaired cars.

So that if an employee of a brokerage house in the lobby of the place where he worked was arrested for an act not in connection with employment—taking bets or possessing drugs—although it wasn't in connection with employment, the standards of conduct and the character requirements for certain jobs are such that that would reflect upon the employer.

In this particular case I am—the hypothetical I am giving you, it may result in a revocation of a bond and, of course, the employer couldn't retain the employee if he wasn't bonded any longer.

Q Let me ask you one final question, Mr. Carter.

During the period that you were employed by the State of New York in the years between 1974 and 1976, were you aware of any claims that were filed under the Supplemental Unemployment Assistance Program?

A Yes, I was.

[174] Q Were you personally aware of any claims filed under that program by employees of church-affiliated elementary or secondary schools?

A Yes.

MR. SHEINFELD: I have no further questions, your Honor.

THE COURT: All right.

Now, Mr. Ball.

CROSS-EXAMINATION

BY MR. BALL:

Q Mr. Carter, have you ever been employed by a private school?

A No, sir.

Q Have you ever been employed by a religious school?

A No, sir.

Q Are you familiar with constitutional law?

A No, sir. I am not an expert on Constitution. I am familiar with constitutional law, yes.

Q Are you an attorney?

A No, I am not.

Q Have you any specialized qualification in the field of religion?

[175] A No, I have not.

Q You are instructing unemployment compensation agents from the states in standards for determination of misconduct?

A Yes. Sir, may I extend that answer?

Q Certainly.

A There are general guidelines and a general format you follow in terms of eliciting facts or evidence to make a determination. Each state law has its own; every state,

the laws are not uniform. These are state laws that are administered. But there are general guidelines for proceeding when the issue is misconduct or voluntary leaving.

But finally, state law is applied to the facts to make a decision.

Q Are there any particular guidelines with respect to misconduct in situations arising in religious schools?

A I don't approach that or have any examples in my training course regarding religious schools.

Q You are not aware of any consideration that is given to those situations?

A No, not in my training.

Q Now, Mr. Sheinfeld asked you a hypothetical question regarding the teacher who teaches that the Bible [176] is not the word of God. You recall what that is, I am sure.

A Yes.

Q Did I understand correctly that the hearing examiner would then examine into the contract, oral or written, between the employer and the employee?

A Yes.

Q Now, suppose that the contract is a statement of faith by a religious school to which the employee pledges fidelity. Do you follow that?

A I follow that.

Q Now, would the hearing examiner then be privileged to examine that statement of faith to see if, indeed, the contract had been breached?

A I don't know how you mean that question. I'm sorry.

Q You don't think you can answer that question?

A I don't know what you mean by the question.

THE COURT: He doesn't understand it.

BY MR. BALL:

Q I beg your pardon, Mr. Carter. Let us suppose that this teacher entered into an understanding with the

school that she would observe a document called a Statement of Faith, and that the school discharges her on the ground that, so the school alleges, she breached the Statement of [177] Faith; taught something contrary to it.

Now, in this small "h" hearing that takes place or in any later hearings, would the hearing examiner examine what the agreement was between the two, the employer and the employee?

A He would. He first would obtain whether there was any disagreeemnt over whether this agreement was violated because you would have the claimant on one hand probably making one contention and the employer making another.

THE COURT: Well, make an assumption that they do disagree.

BY MR. BALL:

Q Yes, make the assumption now that they disagree.

A Then it would be a matter of asking the employer—You said there was a signed document or something about faith?

Q I said that the school has a Statement of Faith, a religious school has a Statement of Faith—

A Right.

Q —to which the employee had pledged fidelity—

A Right.

Q —that he would observe the Statement of Faith.

A And now the hypothetical is that the claimant [178] disagrees; they say they observed the Statement of Faith.

Q This is one hypothetical, one which her Honor suggested.

A Right.

Q That is, that the employer says, "You breached it," and the employee says, "No, I didn't."

What does the hearing examiner do in that case?

A Well, he has to weigh the evidence from both parties and decide in favor of one or the other.

Q All right. Now, how will he weigh that evidence? Does he look at the Statement of Faith? Is that evidence to be looked at?

A If both parties agree there was such a Statement of Faith.

Q Well, we have that as a given now.

A Right.

Q We all agree that there is a Statement of Faith. That was a fact I gave you.

THE COURT: Yes. Let's assume that the Statement of Faith is in writing and it is right there and the teacher has signed it when the teacher started the employment.

THE WITNESS: The person says, "I didn't break it," then the burden of proof or risk of nonpersuasion would be with the employer to show that this person did that, [179] was in violation of this article of faith or their contract.

BY MR. BALL:

Q Why don't you just answer my question, which is: would the Statement of Faith then be examined by the hearing examiner?

A Yes, that would be part of it.

Q Right. Now, having done that, what else takes place in this process of determining whether there was misconduct?

A This is the only issue: that this person violated the contract of hire by breaking this faith?

Q Right.

A Then he or she would have to decide whether this happened or not because you have contradictory statements.

Q Yes. You mean the hearing examiner would have to decide, right?

A Yes.

Q That "he or she" is the hearing examiner, is that what you are talking about?

A Right. You have one statement, and a statement in rebuttal.

Q Yes.

A Then you would ask again to the employer, "Why do you believe or what do you offer to say that she did [180] break this?"

Q "Why do you believe" what?

A "Why do you believe she violated the contract of hire? What act did she commit?"

Q So then you go into the question of whether the employer was correct in stating that this individual breached a doctrine or provision of a statement of faith, right?

A Yes. If the employer's statement was that, you would have to determine whether or not there was an act that broke their contract of hire, or misconduct.

Q Fine. Now, let me pose another question to you, if I may, another case.

Let's suppose that this same teacher in this religious school begins to appear to the employer, the church, the religious school, as lacking in religious fervor. Do you know what I mean by "religious fervor"? High interest, desire to evangelize, be zealous—all right? They begin to—

A I don't—

Q You don't understand what I mean by "religious fervor"? Well, enthusiasm.

A All right.

Q A high degree of interest.

[181] A Yes.

Q And this, in the case of religion, a desire to communicate that very actively to children.

THE COURT: Let me ask the witness this question: Do you know what Mr. Ball is talking about when he uses the word "evangelistic"? Do you understand that word?

THE WITNESS: I think it means someone who tries to proselytize, someone with missionary zeal, someone who tries to—

THE COURT: All right, that is fine.

THE WITNESS: —promote their beliefs.

BY MR. BALL:

Q That is fine, Mr. Carter. Now, the school authorities come to be of the belief that this individual no longer has that religious fervor or enthusiasm or desire to proselytize, and eventually they decide that is very important to them and they fire the teacher on that ground. Suppose now this teacher has been a math teacher, as Mr. Sheinfeld said, has been keeping class punctually, working well with students in terms of the professional teaching of mathematics.

The teacher now claims unemployment compensation and the church says she's guilty of misconduct.

[182] Now, this comes before your small "h" or large "H" hearing situation. What does the hearing examiner do? How does the hearing examiner proceed in that case?

A I think that an element of misconduct which I didn't restate was the willfulness and whether or not the act or acts are within a person's control.

Q Let's suppose, if I may, then, that the act or acts—strike that. This is not a situation, Mr. Carter, in which there is necessarily any element of willfulness. It hasn't been specified; it is perhaps a lack of will.

A Well, an ordinary employer-employee relationship, if I worked for you, if my conduct was not meeting your standards, you would be obliged to inform me: "Mr. Carter, I'd like for you to be more friendly when you are dealing with our customers."

And if your request is a reasonable one, as I said, that element of the employer trying to prevent or control this act, if he had spoken to this person about this—that we would go into.

You are asking what things would we consider. We would consider that.

Q No, I am asking you—well, let me ask you another question because you have suggested it.

Does the Federal Unemployment Tax Act provide [183] that the employer has to go to the employee when he sees everything he is worried about in reference to the employee and say, "I am warning you: Do a better job."

Is that in the Act anywhere?

A That's not in the Act.

Q Thank you. All right. Now let's come back to my example.

This individual has been fired from the religious school because of lack of religious zeal dealing with the students. This teacher is also provedly a competent teacher of math. This person claims unemployment compensation, and the matter comes into a hearing.

A Yes.

Q My question to you is: How will this be disposed of, assuming just those facts?

A First, I would have great difficulty measuring "zeal" and what that meant.

Q You would have great difficulty in measuring "zeal"?

A And what that meant.

Q Yes. So what would you do?

A Then the employer also would be—I would ask what harm and what efforts had been made to correct this. And if no harm accrued to the employer and if this was not [184] an act within the claimant's control, then it would not be misconduct.

Q You say if no harm accrued to the employer, who would judge of that harm?

A Well, the employer would. Since he discharged, he is the moving party in this, the employer.

Q He says he is harmed?

A Yes, the employer would be obliged to show there is harm.

Q Who would judge? Come back to my question, please. Who would judge whether there was harm?

A The claims examiner then would determine whether—

Q The claims examiner would make that determination?

A Yes.

Q Thank you. Now, let me ask you this:

Suppose a school operated by a church refused to comply with the Federal Unemployment Tax Act based upon its claim that it is organized primarily for religious purposes and it is operated, supervised, controlled or principally supported by a church.

Now, do you consider that any employee of a school, of that school, would be covered?

MR. SHEINFELD: I object to that question, your Honor. That is outside the scope of the direct and we do [185] not purport him to be an expert in that matter.

THE COURT: Sustained.

MR. BALL: Your Honor, if I may say, this gentleman is purported to be a specialist in discharges, initial determinations, et cetera, and an old hand in unemployment compensation. It seems to me that he should be competent to answer this question eevn if he is not an expert in that particular area.

THE COURT: Let's hear the question.

(Question read.)

THE COURT: That is outside the scope. Sustained.

MR. BALL: Just one moment, while you are looking at your notes, I want to ask the witness a question.

In the situation where an employee works, is a teacher at a religious school—and you will remember this hypothetical—and the teacher is observed drinking in public —the teacher is not drunk; the teacher is drinking in public, in a public place in which liquor can be sold legally, a bar—and the teacher is in the bar having a drink, not intoxicated but having a drink.

Now the church school, the religious school discharges the employee. You now have a proceeding before you and there is no question that the teacher was having a [186] drink and there is no question that the school

takes a position that drinking is a bad thing. They teach the students that drinking is a bad thing and should not be engaged in.

Now describe to the Court, if you will, what would take place in that hearing. Also assume that drinking in a bar, all the aspects of the drinking were legal.

THE WITNESS: Yes. We would first ask—I have as a fact that he was drinking?

THE COURT: Yes, and not drunk, not intoxicated. He was drinking in a legal place and all aspects of behavior legally.

THE WITNESS: Well, I would ask if he understood that this was in violation of his contract of hire.

I would ask if his employer had directly told him not to engage in this conduct. Those would be questions.

The question of whether or not he is an alcoholic, because that could be treated as an illness.

THE COURT: No, no, no.

THE WITNESS: Okay.

THE COURT: This is a perfectly normal individual having one drink in a legal establishment.

THE WITNESS: So I have asked you whether he knew that this was contrary to the employer's interests. [187] THE COURT: That is the question that the hearing examiner would be asking; is that right?

THE WITNESS: Right.

THE COURT: Now let's assume that the teacher answers the question by saying, "Yes, I knew that it was one of the tenets of the school that teachers should not drink because the teachers were teaching the students that they should not drink."

THE WITNESS: Well, I think that if you are asking me my opinion as to whether or not that was misconduct,—

THE COURT: I am.

THE WITNESS: —I would say yes, that was misconduct in connection with employment. Although it did not happen on the job and directly with his duties, the

nature of the employer's business is such, and such of a sensitive nature that it would require different character standards and performance away from the job.

Another example of that would be a case—I am quoting a case now where a person was a guard in a bank in a small town and the bank president asked the security guard not to stop in the bar before or after work because it reflected on the bank. The employee persisted in stopping in the bar and was discharged. It was upheld, his discharge [188] was held to be misconduct and it was a precedent decision in New York, because the way the law reads, it is in connection with employment. And although his drinking was away from the job, it reflected on the employer and, therefore, was held to be misconduct.

THE COURT: Go on, Mr. Ball.

BY MR. BALL:

Q Suppose, Mr. Carter, that the conduct was a kind of conduct which does not reflect on the reputation of the employer.

A I didn't hear that whole question; I'm sorry.

Q That is all right, sir.

Suppose the conduct is conduct which would not be thought by the public to reflect on the reputation of the employer, but which is nevertheless severely discountenanced by the church.

Let's suppose, for example—or, pardon me. You can answer that if you care to.

A An employer and an employee may enter in a contract and the hours of work may be set at some peculiar times that are not ordinary hours of work. If the employee then does not come in at that time and is discharged for that, then he's violated the contract of hire. Supposing the starting time is 3:00 A.M. If this does harm to the [189] employer and that is their contract of hire, then that discharge would be for misconduct in the facts I am giving you.

Q I was taking Judge Pfaelzer's question into one further example of conduct relating to morality. Her Honor mentioned the case of the person who was drinking.

Let's suppose we have a Roman Catholic school and it teaches that contraception is wrong. But contraception, as we know, is very widely practiced and is probably not generally condemned in the community.

This teacher in the Roman Catholic school advocates the use of contraceptives and is fired for that reason. This misconduct is not misconduct which in any way is harmful to the reputation of the school and the community. What would the hearing examiner do with that question?

A In a Catholic school? You are saying this is a Catholic school?

Q Yes.

A I would say that that would be harmful. If the church doctrine is one thing and the person undermines his employer or takes a stance to the students that is contrary to what he has been—you know, what he is told that he should not promote, then I would think that act would be harmful to the employer's interests.

[190] Q Well, let me ask you this—

A Although not harmful to the public interest.

Q Yes. When you are instructing the people who come to be instructed on eligibility, do you give them any instruction at all as to how to deal with the situation where someone claims to be a minister in the exercise of his ministry in a religious school?

MR. SHEINFELD: I object, your Honor.

THE COURT: Read the question back.

(Question read.)

THE COURT: What is the objection?

MR. SHEINFELD: Your Honor, I believe that is also outside the scope of the direct and I don't believe

that we purported to show that Mr. Carter was an expert on that subject matter.

THE COURT: Well, let's see if he can answer the question.

BY MR. BALL:

Q Do you understand the purport of my question is that the school is claiming that this employee is not covered because of being a commissioned minister in the exercise of his ministry?

A And the question is?

Q And the question is: Do you determine, does this [191] hearing examiner determine whether or not this individual is noncovered or excluded?

A Well, the training I give doesn't pertain to the issue of entitlement or coverage. The people that I am training are dealing with people who are already entitled and covered.

So my training does not deal with that question of entitlement or coverage.

THE COURT: So that is outside the scope of his expertise anyway.

MR. BALL: I beg your pardon, your Honor?

THE COURT: That is outside the scope of his expertise, and that is why you asked the question. You have the answer now.

MR. BALL: I have no further questions, your Honor.

THE COURT: Mr. Daucher.

CROSS-EXAMINATION

BY MR. DAUCHER:

Q Mr. Carter, are you able to estimate percent of disputed unemployment insurance cases in which the issue or one of the issues is misconduct?

A I could give you roughly the separation [192] questions; that is, either voluntary leaving or misconduct. Those are separation issues.

I cannot break it down. About 40 percent of the cases involve separations.

Q Just so that we are clear, the word "separations" to me must come up in all unemployment insurance cases. You have to be separated from your employment to be eligible; is that right?

A I use jargon; I'm sorry. By "separation issues," I mean those where the person voluntarily left his job and those where a person was discharged. I didn't mean separations which are a layoff because of lack of work or a company relocating, or reasons which do not involve an issue which has to be adjudicated.

Q Is your testimony that 40 percent of the disputed cases involve separation issues or 40 percent of all of the unemployment cases involve separation issues?

A I think it is 40 percent of all the issues that are adjudicated out of, for example, ten million issues in 1979. There were ten million decisions made in the local offices. And it is my belief that about 40 percent of those pertain to voluntary leaving or misconduct; I can't break it down any further than that.

Q You say there were ten million decisions made in [193] 1979? I take it under that decision is made each time a person applies for unemployment insurance; is that right?

A Yes, if there is an issue when he applies. If he is laid off for lack of work, you can have multiple layoffs and each time there is no issue to be decided.

But you could quit jobs several times, different jobs several times, be reemployed and quit, and each time file a claim and it would have to be adjudicated.

Q I am not sure that I understand your answer.

THE COURT: Excuse me. It is 40 percent of the cases adjudicated; is that right?

THE WITNESS: Yes, of the total issues we decide. Maybe I can explain that.

There were other issues than the separation issues. There is refusal of suitable work; there is able and

available, or reporting requirements that are also adjudicated.

So there are issues other than—

THE COURT: Excuse me. I understand that.

THE WITNESS: Yes.

THE COURT: You are talking about 40 percent of adjudicated-issue situations are issue situations that deal with separation?

THE WITNESS: Right.

[194] THE COURT: Are you saying that 40 percent of ten million—

THE WITNESS: Yes.

THE COURT: There are ten million cases adjudicated in the country?

THE WITNESS: Yes, in fiscal 1979.

THE COURT: All right.

BY MR. DAUCHER:

Q Let me go back because I am not sure I understand the answer.

Does an adjudication take place each time someone applies for unemployment insurance?

A Not unless there is an issue, and an issue may be whether the person is ready, willing and able to work, whether they refused an offer of suitable work, and whether they quit, or whether they were discharged for misconduct.

Q In the first hypothetical that was posed by Mr. Ball regarding the math teacher who taught that the Bible was not the infallible word of God, in describing how that case would be adjudicated, you said that you would look among other things to whether the work rule of the employer or a condition of hire was that the teacher would not teach that the Bible is not the absolute word of God. Does that condition of hire have to be an express condition, [195] Mr. Carter?

A Some acts are acts that you know or should know as an employee. For instance, an employer doesn't have to tell an employee he has to come to work; that is sort

of an accepted condition of employment that you must report for work.

Q So there are express work rules and implied work rules?

A Yes.

Q Do the implied work rules depend upon the nature of the organization that is the employer?

A I understand the question. I am thinking of the answer.

(Brief pause.)

Yes, I would think that some implied work rules would involve the nature of the employer's business.

THE COURT: We will take the morning recess.

(Recess taken.)

THE COURT: Mr. Carter, you will remember you are still under oath.

THE WITNESS: Yes, I do.

THE COURT: All right.

BY MR. DAUCHER:

Q Mr. Carter, just before the break you testified [196] that implied work rules would vary by type of employer.

Do you recall that?

A Yes, I did—I do; sorry.

Q I take it the concept of implied work rules has something to do with your answer or your response to one of Mr. Ball's questions to the effect that if the employer's business is such that an act away from the job reflected on the employer's reputation, then that could be construed as an act of misconduct; is that right?

A Yes, I did say that; yes.

Q Now, I take it, since different churches have different doctrines, that the implied work rules for one church might be different from the implied work rules for another church; is that right?

MR. SHEINFELD: I object, your Honor. Mr. Carter testified he doesn't know anything about churches.

THE COURT: All right.

Read the question back.

(Question read.)

THE COURT: Can you answer that question?

THE WITNESS: Well, he gave an example of contraception being promoted by a teacher, and I understand that that is a principle of the Catholic Church.

Before I go any further, though, I am not really [197] an expert on church doctrine. But the example he gave was contraception, and I don't know if there is any church that supports contraception.

So that in Church B where there is not a matter of principle or doctrine, then a statement about contraception would not be harmful to the employer's interests; where in Church A, the Catholic Church, which was the example, it was.

Have I answered your question?

BY MR. DAUCHER:

Q Yes, I believe you did. That means, does it not, that in order to determine what implied work might be applicable in a particular case involving a discharged employee of a church, that the hearing examiner would become familiar with what the doctrine of that church was, would he not?

A Oh, anytime an employer says he broke a rule, you'd have to know what the rule was. You couldn't adjudicate the case without knowing what the rule was.

Q But in this case we are not talking about an express work rule of the employer; we are talking about an implied work rule of the employer. We are talking about a work rule that would be implied based upon the doctrine of the church involved.

Now, in the case of an implied work rule of a [198] church that came into issue in connection with the dis-

charge of a church employee, the hearing examiner would have to become familiar with what the doctrine of the church was, would he not?

A He would have to know what the person did, what act led to his discharge.

Q But he would have to know also whether that act violated an implied work rule of the church, would he not?

A Well, the employer, the burden of proof again is on the employer to show that there was cause for the discharge and to explain why this person was discharged.

Q Let's go back a step. You have already testified that implied work rules would differ from one church to another, such as in the instance of contraception. One church may have as a part of its doctrine that contraception is improper; another church may not have that as a part of its doctrine. Therefore, an employee who was discharged from Church No. 1 which had as a part of its doctrine that contraception was improper and an employee was discharged for advocating contraception, the hearing examiner would have to know whether the doctrine of Church No. 1, under the doctrine of Church No. 1 contraception was proper or improper, would he not?

A Again, the only way I can answer that is to say: [199] the employer, being the moving party, has the burden of proof or the risk of nonpersuasion so that when he says, "I fired him for Act A," he then has to show, explain what Act A is and what the impact of Act A on him was and what the conditions of employment were.

Q So it would be up to the employer to show that it was, and in this case we are talking about a church, it would be up to the church to show that part of its doctrine was that contraception was improper, would it not?

A Right, if that was the reason for the discharge.

THE COURT: Mr. Carter, does the hearing examiner ever get into the question of whether a particular implied work rule is reasonable or unreasonable?

THE WITNESS: Yes, and whether it is enforced or not.

THE COURT: So that one of the questions the hearing examiner will take into consideration is whether it was a reasonable implied work rule?

THE WITNESS: Right, and whether it was enforced and whether the employer had taken steps to remind the employee that there is such a rule or such conduct may lead to your discharge. Those are the kinds of elements the interviewer would ask or the adjudicator would ask.

THE COURT: Go on, Mr. Daucher.

[200] BY MR. DAUCHER:

Q In the hypothetical question raised by her Honor, the example was of a person in a bar drinking publicly; not an alcoholic, no particular reference to any impact on the employer other than the fact that the employer was a church and the doctrine of that church forbade drinking.

In the example given by her Honor, to which you responded, I believe, an additional fact was that the employee agreed with the doctrine of the church that forbade drinking—Do you recall that?

A Yes.

Q Let's change the example only to this degree: Suppose the employee disagreed; said, "No, the doctrine of this church does not forbid drinking."

The employer, the church, says, "Yes, the doctrine of this church does forbid drinking."

Would the hearing examiner listen to evidence regarding whether or not the doctrine of the church forbade drinking in that case.

A Yes.

Q Thank you. I want to give you a new hypothetical, a different subject.

I represent the Lutheran Church, Missouri Synod. The Lutheran Church, Missouri Synod maintains, it's been [201] agreed in this action that they maintain synodical colleges for the purposes of training people to, among other things, become teachers in their school.

It's also been agreed in this action that the schools operated by member congregations of the Lutheran Church, Missouri Synod prefer to have teachers in their schools who have graduated from one of the synodical colleges.

Now let's suppose that we are dealing with one particular school in Los Angeles. This particular school in Los Angeles has fifteen teachers. Ideally they'd like each of the fifteen teachers to be graduates of synodical colleges, but in the year 1979 they can only find thirteen applicants from synodical colleges to fill those positions at synodical colleges.

At the end of that year this church is able to find two more people who are graduates of synodical colleges. The church discharges the two non-synodical college graduates, hires the two synodical college graduates to teach at its school.

Are the two discharged teachers eligible for unemployment compensation?

Q Their loss of employment in that situation is [202] through no fault of their own and they would be eligible. There would be no misconduct on their part. The employers would find them probably since he replaced them, his right to replace employees as he chooses.

Q Are you aware of the definition given to the term "misconduct" in the State of California?

A No, I am not. I cannot quote it to you.

Q Does the definition of what is misconduct differ on a state-by-state basis?

A The words, you being a lawyer, you know the words are not the same in each case. The intent of the words are generally the same but the words would not be

the same. There would be fity different sets of words describing what "misconduct" was.

Q Is incompetence misconduct?

A No, not ordinarily. There would have to be willfulness to show that; there was a deliberate intentional poor work performance that was within the person's control for incompetence to be. But unable to measure up to the employer's standards for reasons beyond the claimant's control generally is not misconduct.

Q If a teacher in a school operated by a church proved themselves to be incompetent to communicate the doctrine of the church, the teacher was fired, I take it [203] the teacher would be eligible for unemployment compensation in your experience; is that right?

A He could perform that work to the employer's satisfaction?

Q Yes.

A And his acts were not willful or deliberate?

Q Yes.

A Then he would be eligible. It would not be construed as misconduct.

MR. DAUCHER: Thank you. I have no further questions.

THE COURT: Anything further? Mr. Sheinfeld.

MR. SHEINFELD: Just a few brief questions.

REDIRECT EXAMINATION

BY MR. SHEINFELD:

Q Mr. Carter, I believe during Mr. Ball's questioning there was some discussion of the question of how the concept of willfulness is involved in these determinations. Can you explain to the Court how the question of willful activity becomes a part of unemployment insurance adjudications?

A The last question that the other lawyer posed was one of incompetence or negligence. The unemployment [204] insurance law does not provide for disqualifying people who are out of work through no fault of their

own, and certainly people cannot—everyone is not qualified to be a helicopter pilot or to do a job to an employer's satisfaction. So that in order for them to decide that an act is willful, we have to know whether the person could do it and if he intended to ignore the employer's instructions.

So that another element of willfulness comes in: The claimant had knowledge of what rule or performance requirements were, what the employer's rule was.

So in order for there to be misconduct in some cases there has to be knowledge of a rule and willful disobedience of that rule.

Q So the judging of willfulness is involved both in Mr. Daucher's example of the incompetent employee and also with the example of an employee fired for misconduct?

A Yes. Some acts are so gross that on the face of them, if you were to steal, that that is often not an element that you would consider in willfulness there.

Q Mr. Carter, in response to a question of the Court you indicated that it is necessary for the initial claims adjudicator to involve himself or herself in issues of reasonableness of work rules. What kinds of issues and what questions or matters would be discussed or be involved [205] in judging the reasonableness of a work rule?

A Whether or not the rule was necessary for the conduct of the employer's business, whether or not the work rule affected the employee's health and safety. A work rule could also involve a method of doing business which was questionable.

Q So it would be safe to say, Mr. Carter, that the reasonableness of the work rule depends on the nature of the employment?

A Yes.

Q So that in the same way that drinking by a truck driver might be irrelevant to his employer, drinking by a bank teller would be relevant to his employer?

A I don't think the example is good because truck drivers have to drive, and it is not good to drive.

Drinking by an auto mechanic who repaired, not in connection with work, not during working hours, would be irrelevant, I think.

Q But in the same way that you would look at the nature of the employment to determine what was or was not misconduct, is the same type of inquiry involved in examining the reasonableness of the work rule?

A Yes.

Q Now, there was another question raised I believe [206] by Mr. Daucher involving an issue of whether the employer and the employee disagree about the nature of the church doctrine. Could you explore that issue, but let me frame it in the question of: How are cases adjudicated where there is a disagreement between the employer and the employee about a work rule?

A Well, the first question would be, again: Did the employer advise the claimant, the employee, that there was such a rule? Was the rule reasonable in terms of the conduct of the business? Was the claimant's behavior willful in disregard of the rule? Did the employer make any efforts to prevent or control the violation of the rule, and that would be by advising the person of the rule.

I don't think I can quickly think of another thing we might ask. We would have to know exactly what the rule was and its enforcement. If it was enforced, not enforced, if there were twenty employees and only one was discharged for violating the rules and all the others did it, then of course, that would not be misconduct, more than likely.

MR. SHEINFELD: Thank you very much, Mr. Carter. I have no further questions.

THE COURT: Anything further?

MR. BALL: I have questions, your Honor.

[207] THE COURT: All right.

MR. BALL: May I?

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. BALL:

Q You were testifying with respect, just now, to the employer's duty to have taken reasonable steps to enforce its rules. Now, suppose that the employer's religious principles are such that the employer is not to employ any manner of enforcement but relies solely on the good spirit within the teacher to conform to the rules.

How is that adjudicated? No reasonable steps to enforce being taken, is the point.

A You are suggesting that the rule was not important enough to be enforced or talked about? Or was there condonation and violation of the rule by other employees?

Q No. I do not suggest that the rule was not important enough, but let us suppose the rule is important.

A But not enforced?

Q No steps taken to enforce it; that's right.

A And at the time of hire he was told it was a rule once. I would have to know what the act was because, [208] as I said before, some acts on the face of them do violence to an employer-employee relationship, and some acts are understood—like coming to work; you don't have to tell someone that this job requires that you come every day.

THE COURT: And you don't have to tell them not to commit a felony.

THE WITNESS: Yes. You don't have to tell them not to commit a felony.

BY MR. BALL:

Q Let's suppose that this is a situation in which the rule is that—well, let's suppose it is one item of a statement of faith and it is an item which says that the employee, the teacher in the religious school, is to do certain things, such as pray with the children each norning. Take that as an example. The individual is neglecting to do that and the employer never comes to that person and

says, "Say, are you forgetting your daily prayers for the children? You must do that or you will be cut off. We warn you."

Doing none of that because the employer, the employer's religious principles are that the individual is to be guided by a good spirit within. So the reasonable steps to enforce are not taken. Then the employer one day says, "Goodbye. You are discharged."

[209] Now, how was that adjudicated?

A With great respect, I really have trouble understanding the amount of zeal and religious feeling you are talking about.

Q I can well understand that. I can well understand, Mr. Carter, the situation which would be very perplexing to a governmental administrator or agent to have to get into that area as to what the internal law or regiment of a church would be; whether it does in its own law have to take steps to enforce, et cetera.

The next question I'd like to ask you is this: You mentioned just now about—

A Sir, excuse me a minute.

Q Yes.

A If I could just go back to that question.

The adjudicator is not alone; he has—We are in California. He has a state law and state policies to assist him in making a determination so that he isn't internally drawing up a decision in the case on his own. There is probably, will be precedent decisions or advice from the legal people in the state to assist him with it, so there are going to be policy matters to assist him. He is not acting on his own in making individual decisions.

Q No, there will be more people and more [210] governmental supports for making this determination about the internal life of the Church, right?

A Not more people. There already exists an apparatus in the structure for making determinations and appeal boards. It probably wouldn't be necessary to hire additional lawyers.

Q Now a moment ago you said, "If the rule were important. . . ." Those were your words. Does the hearing examiner ever get into the question of whether the rule is an important one, the rule of the church is an important one?

A Well, the church?

Q Yes.

THE COURT: What you are talking about is whether it is a major or a minor consideration, a major or a minor rule?

MR. BALL: I am, your Honor, yes.

THE COURT: Yes.

BY MR. BALL:

Q And I used the term "important" because the witness had. The question of how important that particular doctrine, teaching, rule, observance, et cetera, is to the church.

Now, do they get into that question of how important [211] it is?

A Would they, you are saying?

Q Well, under your procedures.

A Well, whenever the question comes up on a work rule they would evaluate, and I think I have said before, whether or not the rule is enforced.

Q That is not the question. I asked you whether they would determine whether it is important or not.

A They would determine whether or not it affected the employer's conduct of business.

Q They would determine whether it affects the employer's conduct of business; is that your answer to my question—"Do they determine whether the rule is important?" Would you like to answer that?

A They would have to know what the effect of this was on the employer's business. And I am not speaking just generally of church.

THE COURT: The examiner would have to consider the importance of this infraction, the importance of the effect of this infraction on the employer's business?

THE WITNESS: Yes.

THE COURT: That is right, isn't it?

THE WITNESS: That's correct. For instance, an employer could have a dress rule that a person who had [212] no public contact—for instance, if the person was a woman and wore pants and he said—this person had no public contact—and he said, "I don't want you to wear pants."

BY MR. BALL:

Q Let's come back to the wording, "the effect of this on the employer's business." Now, let's suppose that the business to which you referred is religion. So the examiner makes a determination of the effect of that on the religion or the church, right? Is that your meaning?

A Yes, they would.

Q Is it your meaning?

A Yes.

Thank you. Now let's get on with this.

The employer therefore, the church in this case, may say: "This is of major effect." But the hearing examiner would not have to follow that determination, is that correct? Yes or no.

A Do I have to say "yes" or "no"?

Q I asked if you would.

A Can I say more than "yes" or "no"?

THE COURT: Yes.

THE WITNESS: All right. He would have to know the effect or the importance of that rule and, as I said, he probably would be guided by state policy in that matter.

[213] BY MR. BALL:

Q Well, he would be guided by state policy therefore as to—

A All the determinations are made under the law.

Q Please don't interrupt me.

He would be guided by state policy on how important this religious matter was; all right.

A Was there a question?

THE COURT: Have you answered it?

MR. BALL: Well, I have tried to restate the answer that he gave.

Q Is that the answer?

A He would—First, he is not deciding on the importance of the religious rule. He is deciding whether there was misconduct in connection with employment. So that he wouldn't be saying that, to make that decision he has to decide whether this rule and the violation of this rule is misconduct. He is only making a determination under the state law.

Q I understand.

A I am trying not to say a church rule is unimportant; that is what I am trying not to say because I am sure all your rules are important.

Q Now, you have been testifying that harm to the [214] employer is measured by the hearing examiner; am I correct in that?

A Yes. Again, guided by state policy and laws.

Q Yes, exactly. Now, in the following example I would like you to tell the Court the degree, how the degree of harm would be determined.

Suppose now that there is a teacher in a Christian school who tells the church school authorities but does not tell anybody else, nobody, that she no longer believes in God. She is dismissed for misconduct. But she said she did no harm to anybody because she committed no overt act.

The employer contends it is very much harmed by the very presence of a silent nonbeliever; that is to say, a nonbeliever within the school. How does the hearing examiner adjudicate that?

A The speech is an act saying to the church, "I do not believe in God." If her contract of hire and the

agreements of her employment was such that that was required, then I think perhaps the employer may be within his rights in discharging her. Again, that is a matter for state law and policy, and I am speaking hypothetically.

Q When you say it is a matter of state law or policy then, you are saying it is conceivable that this [215] would not even be considered conduct, let alone misconduct?

A Ordinarily the rules are that there has to be an act or omission in connection with work for there to be misconduct. And again, a statement that had no harm but violated a contract of hire would seem to be incorrect to me; that that did not go to the students, that she was hired under this condition, that she maintain faith or whatever. Then to renounce that, it would seem that there would be a breach of the contract of hire.

Q Even though the teacher in that case might say, "I have never communicated my disbelief to anybody but to the school authorities"?

THE COURT: Do I understand you to say that you would not find misconduct in that situation because there is no harm to the employer?

THE WITNESS: Well, when I said—

The first time I said if that was the agreement that in order to obtain the job that you had to be a faithful person, you had to accept certain tenets, and this was the condition under which she was hired, then the person renounced those tenets; it would seem that that did violence to the original agreement they had.

THE COURT: All right.

THE WITNESS: And although they had not espoused [216] it in front of a classroom, it would have done violence to their original agreement.

THE COURT: So you would find misconduct there?

THE WITNESS: You are asking me my opinion on this and I would think yes. But again, it would be a matter for state policy and state law.

BY MR. BALL:

Q Now, we have been talking about work rules or lack of them. You spoke of justifiable cause for an employee's quitting.

Suppose that in a Christian school you have a teacher of science, Mr. Carter, and the school's statement of faith makes no reference to evolution. But the school, after the individual is hired, insists that he teach that evolution is false.

A He teach—

Q Wait. I am not done with the question.

They insist that he teach that evolution is a false doctrine. The teacher, however, believes evolution to be true. And finally, after quite a bit of tension, the teacher quits voluntarily, claims unemployement compensation. The school says there was no justifiable cause.

How would the hearing examiner proceed to determine that question?

[217] MR. SHEINFELD: Your Honor, I respectfully object to that question. There was no testimony on direct of any sort regarding questions of determinations of voluntary quitting.

THE COURT: Read the question back.

(Question read.)

THE COURT: All right. Overruled.

You may answer the question, if you can.

MR. BALL: Thank you.

THE WITNESS: This is a work rule that was introduced subsequent to the contract of hire and at no time agreed to by the employee and he leaves. Then I would say he would—we would ask him what steps—was he told he would be dismissed if he didn't teach this. And he would have to show, the burden of proof here would be on him to show he had good cause for leaving.

So we would ask, you know, "What harm would come to you by doing this? Were you asked to do something that would harm you, and what steps did you take to correct that."

MR. BALL: I have no further questions, your Honor.
THE COURT: All right. Mr. Daucher.
MR. DAUCHER: I have one, your Honor.

RECROSS-EXAMINATION

[218] BY MR. DAUCHER:

Q In your answer to one of Mr. Sheinfeld's questions I believe you gave a list of kinds of things that a hearing examiner looks into. One of those things on the list was uniformity of enforcement of the rule.

Do you recall that testimony?

A Yes, I do.

Q If we were dealing with the contraception issue, would the hearing examiner listen to evidence of this sort: The church offers to bring before the hearing examiner twenty other teachers who have been discharged for the same reason. Would that be important to the hearing examiner?

A To show that this was a rule that was enforced?

Q Yes.

A Yes, that would be important.

Q Okay. The discharged teacher offers to bring before the hearing examiner twenty witnesses who will testify that they espoused the same thing and were not discharged. Would the hearing examiner listen to that evidence?

A I don't know if that has meaning. They would have to add that the employer knew of it. Just stating that doesn't have meaning to me.

Q Let's add the other element: offer to bring [219] before the hearing examiner twenty witnesses who had done the same thing but not been discharged.

A That would be a consideration.

Q The hearing examiner would listen to that evidence?

A Yes, if the person—he couldn't ignore a statement from a claimant that this was the case. He would have to weigh that in his final decision, along with the employer's statement.

Q In a case therefore between a claimant and a church regarding disagreement over doctrine or enforcement, it would be incumbent upon both of them, would it not, to bring before the hearing examiner evidence of the zeal with which this doctrine was followed?

A This hearing, with a small "h," doesn't involve twenty witnesses coming to the local office or requiring the employer to bring twenty witnesses to the local office to state contradictory—to make contradictory statements. But whatever evidence the employer had, the examiner or adjudicator would be obliged to weigh in making a decision. And in this case it would be a statement that he had fired twenty other people for violating the rule about contraception.

MR. DAUCHER: Miss Reporter, would you read back [220] my question, please. I don't believe the witness has answered it.

THE COURT: No, he didn't. He may not have understood it.

THE WITNESS: I'm sorry.

(Question read.)

MR. SHEINFELD: Your Honor, I'd like to object to that question, only to the extent that Mr. Daucher began it with "therefore."

THE COURT: Yes.

MR. SHEINFELD: And then began discussing enforcement and zeal. The previous question was not about zeal.

THE COURT: All right.

Just rephrase it.

MR. DAUCHER: I will leave off the "therefore."

THE COURT: All right. Give it to him again.

MR. DAUCHER: Do you want me to ask the question?

THE COURT: Please.

BY MR. DAUCHER:

Q In a hearing with a small "h" it would be incumbent, would it not, upon the claimant and upon the church in a case involving dispute regarding church doctrine [221] of enforcement to bring the hearing examiner evidence of the zeal with which the particular doctrine was pursued?

A Yes.

MR. DAUCHER: Thank you.

MR. SHEINFELD: Can I ask one more question, your Honor?

THE COURT: You may.

FURTHER REDIRECT EXAMINATION

BY MR. SHEINFELD:

Q With respect to your last answer, Mr. Carter, by "zeal" did you mean that it is necessary for the hearing examiner to look into whether or not the particular rule was enforced?

A That's what I meant.

MR. SHEINFELD: Thank you very much.

I have no further questions.

THE COURT: All right. Anyone have anything further?

The witness may step down. Thank you.

THE WITNESS: Thank you.

MR. SHEINFELD: If we could have about a minute recess, your Honor, while I track down my other witness.

THE COURT: All right. We will just wait, [222] Mr. Sheinfeld.

MR. SHEINFELD: Thank you.

I'd like to call Mr. Bernard Streett.

(Brief pause.)

BERNARD STREETT,

called as a witness on behalf of the federal defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated. Please state your true, full name and spell the last for the record.

THE WITNESS: Bernard Streett, S-t-r-e-e-t-t.

DIRECT EXAMINATION

BY MR. SHEINFELD:

Q Mr. Streett, would you please provide the Court your present address and occupation.

A My present address is 7807 Gaywood—that is one word—Circle, Baltimore Maryland 21207. My occupation is supervisor of the appeals unit for the unemployment insurance service, Employment and Training Administration, Department of Labor.

MR. BALL: Your Honor, if you will pardon me. Could that last answer be repeated? I couldn't hear.

THE WITNESS: I'm sorry. My occupation is [223] supervisor of the appeals unit in the unemployment insurance service for the Employment and Training Administration, United States Department of Labor.

MR. BALL: Thank you.

BY MR. SHEINFELD:

Q Mr. Streett, could you give us and enlighten the court to your education and work background.

A All right. My educational background is:

I was graduated from the University of Baltimore, School of Law. I was graudated cum laude; was a member of the school's High Star Honor Society, which is a scholastic honor society. I was graduated in June, 1952.

I was admitted to the bar of Maryland in October—I am sorry; June, 1953, and I was admitted to the bar of Maryland in October of 1953.

Q Could you go on from there, after you left law school.

A Okay. Shortly after I left law school I went to work for the Maryland Department of Employment Security as an appeals referee for a period of one year.

Q Excuse me. What kind of appeals; in what program?

A This is unemployment insurance benefit claim appeals. For the next seven years, for a total of eight, [224] I was senior appeals referee in the same agency.

Following that I went to work for the United States Department of Labor in the unemployment insurance appeals program.

Q Excuse me a second. What year did you begin with the United States Department of Labor?

A December of 1962. And I have worked there continuously since that time in the appeals program. Presently—well, I gave you my present job title.

Q What is the nature of your present occupation?

A We review or we offer guidance and assistance to state employment security agencies in the appeals area for unemployment insurance benefit claims.

Do you want me to elaborate on this?

Q If you would, please.

A All right. Basically, we deal with two primary functions. One is in the area of promptness, promptness of adjudication. Unemployment insurance benefits are for non-deferable living expenses, intended for that, and we conceive of our obligation as seeing that the states issue decisions promptly. We expect them to issue approximately 60 percent of their decisions within 30 days, and 80 percent within 45 days.

We offer assistance to states when they are [225] unable to meet these objectives. The other general area is in quality of the hearing and decision-writing process. We do an evaluation, annual evaluation of the quality of the hearing and the decision.

We have a training program in hearings and decision writing which we offer to the states. I suppose we have twelve or thirteen hundred referees in the country; I imagine I have met six hundred of them at these training sessions.

The states, the quality or the qualifications for the hearing officer job in the states vary. In California,

for example, their requirement is membership at the bar; in many states it is not. And for this reason I believe that our training program is rather popular.

Q Would it be safe to say, Mr. Streett, that it is the function of your office at least in part to monitor the nature of the hearing processes that take place in the states and how those processes function?

A Yes, we do.

Q Now let me ask you: Are you familiar with Mr. Ernest Carter?

A I am sorry. I didn't hear your question.

Q Are you familiar with Mr. Ernest Carter?

A Oh, yes.

[226] Q How does the nature of your operation differ from the nature of his?

A Well, ours is a, I guess you'd call it a quasi-judicial hearing process. An evidentiary hearing is allowed to any individual whose claim for benefits is denied, and employers have a corresponding right to a fair hearing.

Q Just so you will be familiar with whatever jargon comes up, the activity of Mr. Carter's office was referred to as "hearings with a small 'h.'" I assume we are now talking about, with your operation, hearings with a big "H"?

A Our operation deals with hearings; with hearings, yes.

THE COURT: You take evidence on the record in the hearings you are talking about, don't you?

THE WITNESS: Yes, we do. As a matter of fact, in all states but two the appeal to court is on the record, made before the administrative agency.

BY MR. SHEINFELD:

Q Does the United States Department of Labor provide to state agencies guidelines or guidance as to how these hearings should be conducted?

A Yes, we do.

[227] Q Does that guidance at times include suggestions as to how particular fact patterns may or may not be adjudicated?

A Particular fact patterns?

Q As hypotheticals.

A Yes, yes, particularly in certain areas.

Q Let me ask you, Mr. Streett: Are you familiar generally with the issues surrounding the coverage of employees of elementary and secondary schools under the 1976 amendments to FUTA?

A Yes.

MR. SHEINFELD: Your Honor, I would offer Mr. Streett as an expert on the issue of the federal standards for adjudication of claims in formal hearings before state unemployment insurance agencies.

THE COURT: Mr. Daucher.

MR. DAUCHER: I would like the opportunity to voir dire, ask Mr. Streett some questions.

THE COURT: You may do that now.

Well, we will recess until 1:30, and then you can do that.

Will you wish to do that also, Mr. Ball?

MR. BALL: No, I will not, your Honor.

THE COURT: All right.

(Recess taken until 1:30 P.M.)

[228] LOS ANGELES, CALIFORNIA;
WEDNESDAY, AUGUST 13, 1980; 1:30 P.M.

THE COURT: Mr. Streett.

BERNARD STREETT,

the witness on the stand at the time of the recess, having been previously duly sworn, resumed the stand and testified further as follows:

THE CLERK: Mr. Streett, you are reminded that you are still under oath.

THE WITNESS: Yes.

VOIR DIRE EXAMINATION

BY MR. DAUCHER:

Q Mr. Streett, when you worked as a referee, as an appeals referee for the unemployment insurance program in Maryland—and I believe, if my notes are correct, the years were approximately 1953 to 1962 that you did that,—

A That's correct. I had two jobs there. One was a referee and the other was senior referee. They were similar.

Q Did Maryland have in its unemployment tax law at the time an exemption for non-profit organizations?

A Yes.

Q So I take it that during the time that you were [229] an appeals referee in Maryland you never heard any case that had anything to do with a non-profit organization, much less a religious, non-profit organization; is that correct?

A Not exactly. As a matter of fact, I can recall a case that turned on this point, religious belief, and this type of thing; a hearing that I held.

Q So you did have, during the time that you were an appeals referee in Maryland, you did have a case involving a non-profit organization?

A Yes, one that I can recall very vividly.

Q Without telling me the issues, how did that case arise, Mr. Streett?

A A claim for benefits was filed by the claimant and apparently on the basis of information that the claims examiner received from the employer, the last employer. It was a religious organization. The claimant was denied benefits and he filed an appeal from which we held a hearing.

Q You held a hearing despite the fact that there was an exemption in the Maryland unemployment insurance law for non-profit organizations?

A Yes.

Q Was there some question about whether his employer was a non-profit organization in that case?

[230] A No, not really.

Q But you held a hearing anyway?

A That's right. We often, we hold hearings when there is no employer at all involved.

Q What were the issues in that hearing that you held, if you can recall?

A The issue was whether he was discharged for misconduct connected with his work.

Q Can you tell me why you even reached that issue if the employer, to begin with, was not one from whom a discharged employee might collect unemployment insurance?

A Yes. It isn't a contest between employer and employee; it is an adjudication of a claim of unemployment benefits. The claims office felt, on the basis of information they secured from the employer, that this particular individual was not entitled to benefits.

Q Perhaps you misunderstood my question. My question goes to this fact: How do you even reach the misconduct question if you don't have an organization whose employees would be covered by unemployment insurance to begin with?

A Well, the individual involved had apparently earned his wage credits from some other employer that was within covered employment, and then he went to work for [231] this organization. I don't recall just where he earned wage credits or this type of thing. As a matter of fact, it wasn't of any significance and I doubt that I questioned him on it.

The question was, and the issue before me was whether or not the individual was discharged for misconduct from his last employer.

Q In that instance the non-profit employer would not be the one financially concerned with whether unemployment insurance benefits were awarded to the person, would he?

A That is correct.

Q Since 1962 have you conducted any hearings regarding unemployment insurance benefits?

A Yes, for a period of about a month. I don't recall the dates; I would say about three years ago in the District of Columbia on a temporary loan basis.

Q How many hearings did you conduct during that period of time?

A I would say approximately 65 to seventy.

Q Was this prior to January 1st, 1978?

A Yes, it was. It was approximately three or four years ago, I suppose.

Q Did any of these hearings involve a dispute [232] between a church school and a discharged employee regarding the reasons for discharge?

A No.

Q Have you ever attended a hearing at which the issues involved a dispute between a church and a church employee regarding the reasons for discharge?

A I don't recall any other than the one that I mentioned which I conducted myself many years ago.

Q Have you ever read the transcript of any hearing where the issues involved a dispute between a church school, the discharged employee, regarding the reasons for discharge?

A I don't recall any.

Q In your capacity as an assistant to state unemployment programs in the training area, have you written any guidelines for state hearing examiners to use in connection with hearings between churches, church employees, regarding the reasons for discharge?

A We have issued guidelines for all hearings, no matter what issue or who was involved, but not specifically church employees and church institutions. Our

guidelines are general and are intended to cover all hearings.

MR. DAUCHER: Your Honor, that is the end of my questions for this witness. To the extent the witness is [233] offered as an expert on what federal guidelines are or what would happen during a hearing between a church and a church employee regarding the reasons for discharge, I would suggest that he has demonstrated no expertise there.

MR. SHEINFELD: Your Honor, I would make two points in response to that.

In the first place, to demand, as Mr. Daucher apparently does, that the witness have expertise in adjudication of this specific type of claim is an impossibility since this provision was only added in 1978 and has been in litigation almost continuously since then. So there have been virtually none, or hardly any, claims of that type.

Secondly, we are offering Mr. Streett's testimony on a somewhat narrower basis. As I indicated with respect to Mr. Carter, the federal government is required under FUTA to supervise the operation of the state unemployment insurance programs. That supervision, as both Mr. Streett and Mr. Carter testified, involves reviewing the manner in which claims are adjudicated and determining whether that procedure is correct under the federal standards.

We offer Mr. Streett for the purpose of establishing whether or not a certain class of claims—how that particular class of claims should be adjudicated under the federal standards.

[234] I would make one further observation. It is the plaintiffs who have raised the issue of the purported entanglements involved in the adjudication of unemployment insurance claims. They have offered in their case in chief as testimony, no evidence, no independent case whatsoever that there is such a problem except rank speculation.

We certainly would believe it is incongruous, at best, for the plaintiffs to now object to the testimony of a witness who can provide the very information that we are all seeking.

THE COURT: Well, let's hear what the questions are. Mr. Daucher has a good point.

We will hear what your questions are. Start.

DIRECT EXAMINATION (Resumed)

BY MR. SHEINFELD:

Q Mr. Streett, let me present to you a series of hypothetical questions, and I am then going to ask you whether, based on your experience with respect to the federal standards established for the adjudication of claims under unemployment insurance programs, how these claims should be adjudicated.

The first hypothetical question involves a teacher who is teaching in a church-affiliated school. [235] The beliefs of that school and the operators of that school include the fact that the Bible is the original and direct word of God. When that employee teaches his students that the Bible is not the direct word of God and is then fired based on those facts and pursuant to the federal standards as you are familiar with them, should that claim be adjudicated by a state referee without reference to the correctness, sincerity or accuracy of the beliefs of that school?

A Oh, yes.

MR. DAUCHER: I have an objection to the form of the question.

THE COURT: All right.

MR. DAUCHER: First, there's been no foundation laid for what we are talking about when we talk about "federal standards." The witness responded, I believe, to one of my questions.

THE COURT: That's correct.

You have to rephrase the question.

BY MR. SHEINFELD:

Q Well, let me create a little further background.

Mr. Streett, pursuant to the responsibilities of your office do you give guidance to the state agencies as to how adjudications involving questions of misconduct in connection with the work should be conducted?

[236] A Yes.

Q Do you in the course of your normal business activities review the manner in which the agencies make such adjudications?

A Yes.

Q Do you then advise the state agencies as to whether or not the manner in which they are making those adjudications are proper?

A Yes.

THE COURT: Now, is there something that is called "federal standards"?

MR. SHEINFELD: I believe there are. There are standards.

THE COURT: All right. Let's clear up what they are, then.

BY MR. SHEINFELD:

Q Mr. Streett, through what mechanism are the criteria and standards with which you judge the activities of the state agency, how are they communicated to those state agencies? How do they know what you expect them to do?

A Well, we have developed criteria with which we evaluate the quality of hearings. All states have received these criteria. All states do their own evaluation on a [237] sample basis and they look at the work of every hearing officer within the state at least once a year.

One third of these, one third of the states in the nation submit their worksheets, their decisions, and the transcript or tape recording of the hearing to us for validation every year. It is on this basis that we—

THE COURT: On a rotating basis?

THE WITNESS: Yes, ma'am; that right. One third every year. We do approximately seventeen states a year this way. It represents the work of almost all the referees in the country, or hearing officers.

BY MR. SHEINFELD:

Q Let me ask you, Mr. Streett: Can you explain to us in general terms what the criteria are with respect to the adjudication of claims involving separation?

MR. DAUCHER: Objection, your Honor. I don't wish to be overly technical because I believe I want this testimony in the record as much as the federal defendants do, but the witness has testified that these criteria are written to the states and are in writing. We have got, first of all, therefore, the best-evidence problem.

I'd suggest that unless there is something to hide with respect to what that criteria contain that the federal defendants consider producing the written criteria [238] that are given to the states.

THE COURT: There are written criteria, aren't there?

THE WITNESS: That's right.

THE COURT: Do you have them with you?

THE WITNESS: No, I do not.

THE COURT: Do you have them with you?

MR. SHEINFELD: No, your Honor, I do not. I certainly can supply them to the Court.

THE COURT: All right. When?

MR. SHEINFELD: Within a week of my return to Washington, your Honor, or less.

THE COURT: Well, that won't help him now with the examination of the witness.

MR. SHEINFELD: Your Honor, they were aware of the fact that Mr. Streett was being called as a witness and what he was being called for.

THE COURT: But I don't think they could anticipate the question you asked, could they? You know, having him describe them when they actually exist is not very satisfactory, so go on to another line of questioning.

MR. SHEINFELD: Well, your Honor, my next line of questioning, unless the Court wishes me to move in another direction, would be to simply re-pose the [239] hypothetical. Now, if the Court desires some further elucidation of Mr. Streett's background before I move on to that, I'd be happy to do so.

THE COURT: No, I think we know enough about this background now, so re-pose the hypothetical.

BY MR. SHEINFELD:

Q Mr. Streett, let me suggest to you a hypothetical situation and ask you if, based on your experience and training, you have an opinion as to how that situation should be handled under the standards set for the adjudication of claims.

The hypothetical question involves a teacher in a church-affiliated high school and the sincere and true beliefs of the operators of that school include the fact that the Bible is the true word of God.

MR. DAUCHER: We are back to the same problem, your Honor.

THE COURT: You are back to the same problem of not having the written standards.

MR. BALL: That's correct.

MR. DAUCHER: I might make a suggestion because, as I say, I don't—

THE COURT: Because I intend to move along with this trial, and so whatever you have to suggest.

[240] MR. DAUCHER: Well, these written standards have to be someplace here in California if they are communicated to the states.

THE COURT: Certainly. They also could be telexed here; there is no reason why we have to wait a week or ten days for those standards.

BY MR. SHEINFELD:

Q Mr. Streett, how extensive are these criteria that we are talking about?

A Every state has copies. The main office in California is in Sacramento, but I wouldn't be surprised that there is a copy of it available in the office in Los Angeles.

THE COURT: Right here?

THE WITNESS: I think so. I'm not sure. We send it, of course, to the headquarters, and they distribute it as they see fit. But I would think there would be a copy here; there may not be.

MR. SHEINFELD: Excuse me, your Honor.

THE COURT: I suggest you get the help of your co-defendants and have one of the counsel call.

MR. SHEINFELD: If the Court could excuse me for a moment.

THE COURT: Yes.

[241] (Brief pause.)

THE COURT: All right. What is your decision?

MR. VESELY: We will attempt to get them.

THE COURT: All right. On that basis I will let you go on with the examination.

MR. SHEINFELD: Could the reporter read back the last question.

(Question read.)

THE COURT: All right. Now, that is not a question, that is an incomplete question. So ask the question and make it into a complete question.

Now, I want to explain something to you: If they do not have the opportunity to see those written standards and cross-examine the witness about them, I will strike the witness' testimony about this. But we have to get along on this trial, so you go on.

MR. SHEINFELD: Yes, I understand that, your Honor.

THE COURT: All right.

BY MR. SHEINFELD:

Q Mr. Streett, do you understand the hypothetical situation that's been posed?

A Yes, I think so.

Q Do you have an opinion as to how a situation such [242] as that described should he handled under the federal standards set for the adjudication of claims under unemployment insurance?

A Yes.

Q What is your opinion?

A We look at the contract of employment between the worker and the employer. If there was an understanding at the inception of employment that certain religious principles were to be taught, an understanding by both parties, and if during the course of employment it was violated, this would be very significant in the decision which would probably effect a denial of benefits.

On the other hand, if there was no understanding between the parties at the inception of employment, the decision would probably go the other way and effect an allowance of benefits, without disqualification.

THE COURT: Just a minute.

Read the answer back.

(Answer read.)

THE COURT: Go on.

BY MR. SHEINFELD:

Q Mr. Streett, let me pose to you a second hypothetical involving that same teacher employed in that same school. In this situation he is discharged when the school [243] finds out that he was seen in a bar drinking.

Well, let me just ask you that. Just based on that information, when that person is terminated for that reason, do you have an opinion as to how that situation—

A Yes.

THE COURT: Mr. Streett, in this hypothetical, assume that the person was not an alcoholic and was not overindulging in alcohol but was drinking one drink in a perfectly legal establishment and was behaving in an otherwise proper fashion.

THE WITNESS: Yes. My view is this: that if he had an understanding—We look to the contract of employment. If he had an understanding at the inception of employment and agreed that he would do no drinking, that would be quite significant and probably effect a denial of benefits.

On the other hand, if nothing was said about it or he didn't have such an understanding, I would presume that benefits would be allowed in that situation.

BY MR. SHEINFELD:

Q Let me ask you one final question, Mr. Streett.

During the course of your involvement with the unemployment insurance program with the United States Department of Labor, are you aware of any issues arising [244] under Section 3306(d)(2) of FUTA involving issues of partial coverage?

A Yes.

Q Can you explain to the Court how such issues arise.

A Well, sometimes a worker works in two distinctly different areas and he may be—

Q Can you give the Court an example of that situation?

A Yes. Let me draw an example from my own experience when I was a hearing officer with the State of Maryland.

On the eastern shore of Maryland there are large farms, what I call "large," and adjoining canneries. Now very often employees will work on the farm and in the cannery at different times. This was years ago when agricultural employment was excluded from coverage.

However, the work in the cannery was covered, so we had that situation there. And I, as senior referee, I had most of this type of case. The distinction between the referee and the senior referee in the state was a type of case that we heard.

I would, as senior referee, I would get this type and others.

[245] Q So Mr. Streett, it would be correct to say that under unemployment insurance programs in conformity with FUTA, the difficulty or the question of determining coverage of employees who do different kinds of work is common?

A Well, we don't have a lot of hearings on this. But it happens; it happens often.

MR. SHEINFELD: I have no further questions, your Honor.

THE COURT: All right. Mr. Ball.

MR. DAUCHER: May I make the inquiry as to the code section that you recited that these split hearings come under?

MR. SHEINFELD: It is 26 U.S.C. 3306(d)(2). Let me check to be sure.

CROSS-EXAMINATION

BY MR. BALL:

Q Mr. Streett, do you monitor the nature of the hearing process?

A Yes, sir; sometimes.

Q Yes, I understood you to say you do. Does that hearing include hearing claims of exclusion?

A Yes.

[246] Q The hearing process does?

A Sometimes, of course. Not often, but sometimes.

Q Have you ever been employed by a religious school?

A Never.

Q Ever been employed by a private school?

A Never—oh, yes; as a matter of fact, I was. No, no, it is a public school.

Q Are you familiar with any directives from the Department of Labor or a directive from the Department of Labor dated May 30, 1978 which states that the only employees who are excluded from the coverage in religious schools are those who perform strictly church duties?

A Yes.

Q You are familiar with that?

A I have read it.

Q Yes. Is that now the position of the Department of Labor?

A Yes.

Q Then there are teachers in religious schools who are excluded?

A I'm sorry; I missed your question.

Q Then there are teachers in religious schools who are excluded?

[247] A Excluded from coverage?

Q Yes.

A I think teachers would be covered, most teachers.

Q Well, you just answered that there were some who are not.

A I don't recall that.

Q Well, I will recall it to you. Just a moment. Let me come back to the May 30th, 1978 statement which you said you were familiar with:

> "The only services performed in church-related elementary and secondary schools recognized as being within the scope of the exclusion permitted by Section 3309 (b) (1) FUTA are those strictly church duties performed by church employees at the school pursuant to their church responsibilities."

A That's right.

Q Those are the only ones that are excluded, right?

A Excluded from coverage, yes.

Q Yes. So there are employees who are excluded from coverage?

A Or church—or those with church duties. That is what you said.

Q Strictly chuch duties, would that be correct?

[248] A That's correct.

Q That then is the position and that has not been changed?

A That's correct.

Q Yes. In your instructions to hearing examiners in your monitoring of the hearing process, how was the hearing examiner supposed to know whether a church is involved?

A Whether a church is involved?

Q Yes. That is the question.

A I don't follow your question.

Q Well, it is easy to follow because, first of all, the May 30, 1978 document referred to "church-related schools" and, secondly, the quotation that I gave you and which you repeated is "strictly church duties."

Now, what I want to know is how the hearing examiner figures out whether there is a church involved or not.

A Well, I think that the name of the case would show whether there is a church involved.

Q The name of the case would?

A Yes, the employer's name would show that it is a church or not. I would think that.

I am not sure that I am following your question, [249] though.

Q Now, who makes the judgment that a church is involved?

A Who makes the judgment as to who was the employer, or that the employer was a church; is that what you mean?

Q The latter.

A That the employer was a church?

Q Yes.

A If the judgment had to be made, I presume it would be the hearing officer. I don't know of an instance where the hearing officers made such a judgment.

Q Excuse me, sir.

I'm sorry. Go ahead.

A I don't know of any instance where this was necessary.

Q Right. Now, would you be surprised, Mr. Streett, to know that there are many different definitions of the word "church"?

A I suppose it is. I suppose so. I would think that it would be easily defined.

Q Now, did Congress, in enacting the Federal Unemployment Tax Act, define the word "church"?

A I don't know. I don't think so.

[250] Q You don't know? You are very prominently associated with the administration of this Act or the hiring of people who monitor the hearing process.

You don't know; is that right?

A I don't know the answer to that question, but—

Q Thank you. But a hearing examiner will be able to make that determination; is that right?

A Yes, I think if he is called upon to make it, I think is is a relatively simple thing to define.

Q Now, with respect to an adjudication concerning a work rule of an employer, it was testified by Mr. Carter this morning—I think you heard his testimony?

A No, I wasn't here.

Q I am sorry, then. I will reword the question.

THE COURT: He was excluded from the courtroom.

MR. BALL: I didn't realize that had been for the whole testimony.

Q Well, I will tell you then that Mr. Carter testified that when there is an adjudication respecting a work rule, inquiry is made of whether the employee knew of the rule; and then secondly, according to Mr. Carter, the

question raised is: was the rule reasonable, in view of the business of the employer.

MR. SHEINFELD: Your Honor, I think I will [251] object to Mr. Ball trying to confront this witness with the testimony of another witness whose testimony he did not hear—at the plaintiffs' request.

THE COURT: No, he may do that. It is cross-examination.

Go on.

BY MR. BALL:

Q That the inquiry is made as part of the adjudication process as to whether the rule is reasonable in view of the business of the employer.

Now what inquiry, I would like to know, is followed by the hearing officer to enable him to make a judgment on that issue?

A Well, the hearing officer would first determine whether the rule was understood and accepted by both parties as part of the contract of employment. I would think that it would revolve around his conclusions on this point. If the parties had an understanding that this is the rule, both parties agree to it, it would be found as a fact that this rule—this was a rule, and the further finding as to whether or not it was a violation of the rule.

Q Yes, but my question was this: Let's suppose they both say, "Yes, that is the rule," but the employee says, "That rule is entirely unreasonable."

[252] Now where do you go?

A Well, I would then find out whether the employee knew of the rule and accepted employment with the understanding that he would conform with this rule. If he accepted employment with that understanding and agreement, rather, then I would—and he violated the rule, then I think he would be denied benefits.

On the other hand,—

Q So then, if it is true that Mr. Carter testified this morning that an inquiry is made as to whether the rule is reasonable—that's his testimony—he is incorrect in that, in your view? In other words, the hearing examiner does not weigh the reasonableness of the rule?

A Well, in most instances I would say no. He would accept what the employee and the employer agree to as the contract of employment.

Q Yes, sir, but not in all instances, right?

A There may be some. I don't—there may be some instances in which—

MR. BALL: There may be some?

THE COURT: There may be some instances in which the reasonableness of the rule is considered; is that right?

THE WITNESS: Yes, I suppose so. I can't think of any in connection with the church-related school issue, [253] but in other situations there may be.

BY MR. BALL:

Q Now, you testified a few minutes ago on direct examination to a couple of hypothetical questions that Mr. Sheinfeld posed. He mentioned a case of the teacher who was dischareged because she denied the inerrancy of the Bible. You then said "Well, the hearing examiner looks at the contract. If the contract is violated, that would be very significant in the decision."

A That's right.

Q Now, what do you mean by "very significant"?

A I would assume that it would effect a denial or an allowance of benefits.

Q What do you mean by "it would effect"?

A It would effect.

Q "Effect"?

A Assume that in the hypothetical case the party agrees that he would teach this or not teach this, as the case may be, and he ignores this agreement; does it anyway. This is probably going to be construed as—and

is discharged as a result; this would probably be construed as a discharge for misconduct and it would cause the denial of benefits.

Q Now, the word "probably," the adverb "probably" [254] you bring in there. Does that indicate there is discretion on the part of the hearing examiner to weigh whether or not this would happen?

A Not really.

Q Then why did you use the word "probably"?

A Well, perhaps I should not have used the word "probably." I feel that it would have effected a denial of benefits if the rule had been agreed to and violated. On the other hand, if they—

Q You monitor the process but you—

A I am sorry sir. I didn't hear your last—

Q You monitor the process but you—

A We monitor the process?

Q Yes. You monitor the hearing process?

A Yes, in a way.

Q Yes.

A We don't monitor every hearing, of course.

Q Now, let's suppose that there isn't the contract, there isn't the understanding that you spoke of. In that event you said the decision would probably go the other way and effect an allowance of benefits without disqualification.

A That's right.

Q Yes. So that if this teacher were discharged [255] because she said, "The Bible is not true," and it wasn't perfectly clear from the contract whether or not she had a duty to say it was true, and the church employer says, "We believe that every teacher in this school must teach that the Bible is true," and the teacher says, "No, that wasn't my understanding"—so that there is this disagreement of which you spoke. In that event the hearing examiner finds in favor of the teacher?

A That's correct.

Q Thank you. So it would be the parallel case about the teacher who takes the occasional drink under—

A That's correct.

Q Thank you. Now, is an examiner required to have any specific religious training?

A No.

Q He may nevertheless pass upon a religious issue?

A I don't know how he would pass upon a religious issue.

Q Well, you were asked about a religious issue in testimony you had once given, but I won't repeat the testimony. But I will ask you this question, if you would assume these facts:

A teacher in a church school voluntarily resigns his position in protest of pressure from the minister, who [256] is the head of the school, that minister desiring the teacher to teach that interracial marriage is a sin under the doctrine of the church.

Now, the teacher who resigned then filed a claim for unemployment compensation and the claim is denied and then there is an appeal. Then the claimant presents evidence of other church officials that in fact it is not a sin against the church to marry, to have interracial marriage, but the school presents testimony that it is a sin.

A Okay.

Q Now, we have then conflicting evidence as to what the church's doctrine is. The hearing examiner's job—if this program is to be imposed upon religious schools, that is—the hearing examiner's job is to make a decision as to whether this individual gets unemployment compensation or not.

A That's correct.

Q Now, is this a case—or am I correct?—is this a case in which the hearing examiner would abstain and say, "We don't get into these matters"?

A No. The hearing examiner would then decide whether or not there was—what the understanding was at the time of employment.

[257] Q Yes.

A And it would—

THE COURT: Excuse me just a minute. Go ahead and finish the question. Then I have a question for you, Mr. Streett.

Go ahead. Finish your answer.

THE WITNESS: We look at the contract of employment in almost every case involving an employer and and employee, every hearing that we hold in which there are two parties involved. The decision revolves around the contract of employment; in a misconduct case whether there was a violation, in a quit case whether there was good cause to leave. This is what they look at.

BY MR. BALL:

Q This is the case where we don't have an understanding—

THE COURT: Excuse me just a minute.

MR. BALL: I am sorry.

THE COURT: Mr. Streett, would you not agree that it is very difficult, it would be very, very difficult for a religious school to enter into a contract with a teacher in that school which included all of the things the teacher was supposed to teach?

THE WITNESS: I don't think so. I think that— [258] I think that this, if this were important to the school, I think the teacher would be told this when he or she is being interviewed or when they decide who to take for the job. Generally an employer, particularly in a situtation where there is a professional job like a teacher, generally the employee is told what is exepected of the employee.

THE COURT: Well, let me go back to what I was asking you. We are now talking about specific doctrinal matters that pertain to that religion.

Would you expect that contract of employment to include a specific statement of what those doctrinal matters are and the position the school takes on them?

THE WITNESS: I think the significant ones, yes. There may be some obscure ones that wouldn't be con-

sidered and wouldn't be discussed, but I think, I would think that the employer, the church, would have an understanding with the employee about the significant conditions of employment; and I think this would be a significant condition of employment.

THE COURT: All right.

BY MR. BALL:

Q Now, what if there isn't any understanding? In the case I gave you there is a misunderstanding.

A Okay.

[259] Q Now what do you do?

A In that situation it would lend itself to a decision in favor of the employee.

Q Now let me ask this: Suppose that there isn't any contract at all. Suppose the church within its liberties feels it doesn't go in for contracts; it looks at what the beliefs are, estimates the faith and beliefs of the believing teacher and hires the teacher on that basis. Do you suggest that in order to protect its rights under the unemployment compensation law that a church must obligate itself or is obligated to have a contract with somebody?

A Not a formal contract in any sense. I think all employment derives from contract, and that is what we look at. Very often and probably more often than not there is no formal, written or even oral contract of employment, but all contract derives—all employment derives from contract. There is an understanding at the inception between the worker and the employer as to what is expected and what the remuneration will be.

Q Now let me ask you this: A few moments ago did you refer to provisions of the agreement that are significant, as against those that are not?

A Yes.

[260] Q Suppose that the agreement consists of a statement of faith and a willingness to subscribe to it. Now, would you say that there could be within that some provisions that are more significant than others?

MR. SHEINFELD: I would object to that question unless there is a better description of precisely what a "statement of faith" is.

MR. BALL: Well, I will tell you what it is, if I may.

May I continue, your Honor?

THE COURT: Yes, you may.

BY MR. BALL:

Q A statement of faith, let us say, is a statement of twelve articles of belief that the church has with respect to the existence of God, the hereafter, the lordship of Christ, et cetera, et cetera. That is what a statement of faith would be. I can hand you one if you would like to look at it.

But would you find, since this is the contract, would the hearing examiner possibly find that some parts were more significant than others?

A No, I would think not. When I said "significant" before, I had reference—I intended it to mean something important to the employer, as distinguished from something [261] that is not of importance or not quite so important.

Q The hearing examiner would judge what is important to the employer?

A No. I was, as I recall, I was responding to a question about: Would the employer and the employee go through the process of having a full and complete understanding of every aspect of the religious teaching, and this type of thing.

I think my answer was that the employer, the church, would inform the prospective employee what is expected of the prospective employee and would include in that all things of consequence to the church.

Q Now, the hearing examiner then does not attempt to say that anything is more significant in this relationship than any other thing?

A Well, let me respond this way: The hearing officer's first function is to find as a fact what occurred to

bring about the termination of employment, and then the hearing officer is obliged to decide whether or not it violated any duty the employee owed to the employer.

And if yes, the hearing officer is obliged to deny benefits. If no, the hearing officer is obliged to allow benefits without disqualification.

Q Now, you mentioned that the hearing examiner [262] then examines into, your words now, "what occurred to bring about the termination of the employment."

A Right.

Q Yes. Now let's suppose that what brought about the termination of the employment was a gradual lack of religious enthusiasm upon the part of the teacher, for which he is eventually fired.

A Okay.

Q The hearing examiner then inquires into what occurred to bring about the termination of the employment—namely, the gradual loss of religious fervor. Right?

A Well, we would ask them to be a little more specific, but that is a factual conclusion. We would ask them to be more specific as to just what occurred and perhaps he would, the hearing officer would then draw the conclusion that you have mentioned.

Q Yes, Mr. Streett. My question then to you was: The hearing officer will then go into those circumstances relating to the charge of loss of fervor?

A Yes.

Q Thank you. Now suppose, Mr. Streett, that a religious school which has discharged a teacher claims that the teacher was an excluded employee because the teacher is regarded by this church school as a minister and his [263] teaching as an exercise of his ministry.

Now, the question is: From you as the monitor of the hearing process in which this event occurs that I am going to describe, suppose now that the school, as the employer, raises the objection that you should have noth-

ing to do with this discharge case and there can't be any question of unemployment compensation because the employee is noncovered, is excluded as a minister in the exercise of his ministry.

MR. SHEINFELD: I would object to that question as outside the scope of the direct and beyond the scope of this case. There is no issue in this case about the definition of "ministers" under Section (b)(3) of FUTA.

THE COURT: Well, you may. Is is cross-examination. You may ask that question.

MR. BALL: Thank you, your Honor.

THE WITNESS: Okay. I think that the case would revolve around a discharge—Is this what you are saying, he is discharged? May I ask you to repeat it; I am not sure that I followed it.

MR. BALL: Yes, I will.

Q Simply saying, "Yes, we have a discharged employee." That's right.

A And let me rephrase, let me see if I understand [264] the question.

You have a discharged employee. The employer is not maintaining that the employee was discharged for misconduct but that the employee was not covered by the unemployment insurance law because his duties were religious, as distinguished from non-religious.

Is that your question?

Q No. I was just trying to pose—

A I misunderstood the question.

THE COURT: That is not the question, Mr. Streett.

THE WITNESS: I'm sorry. I misunderstood it, then.

BY MR. BALL:

Q Yes. I am posing a question of an employee or employees of a church school. The church school, the employer, claims that this individual or these individuals are noncovered employees for the reason that the

church says, "These people as a group are ministers in the exercise of a ministry; thus, they are under the statutory exclusion."

A Okay. I understand.

Now, I would—and the question is whether or not they are covered by the unemployment insurance law of the particular state. I would say that it would depend on whether or not they were working as teachers or whether [265] they were ministers; what work they were doing.

Q Thank you. Now, in other words, the hearing examiner would make a determination as to that?

A Yes.

Q Thank you.

THE COURT: Mrs. Brosnan, read the answer back, the question and the answer back.

(Record read.)

THE COURT: The hearing examiner would make a determination as to the duties of that individual; is that right?

THE WITNESS: As to whether or not his duties were exclusively religious or in teaching or something else.

THE COURT: Yes.

BY MR. BALL:

Q I had thought the answer was—maybe I am wrong—as to the substance of it was; you would make a determination as to whether he is a teacher or a minister.

THE COURT: That's right.

MR. BALL: Excuse me, your Honor.

THE COURT: That is correct. That is what your comment was. You are correct about what you just said. You asked him would the hearing examiner make a determination as to whether the person was a minister or a teacher.

[266] MR. BALL: Yes, your Honor.

THE COURT: He has said the same thing back to you in different words.

Isn't that true?

THE WITNESS: That's right.

THE COURT: Yes.

MR. BALL: I have no further questions, your Honor.

THE COURT: Mr. Daucher.

MR. SHEINFELD: Your Honor, before the questioning continues, I have some information from the State of California concerning those documents, but I need to get Mr. Streett together with the State of California people to determine if what they have is what he was discussing.

THE COURT: Well, we will do that in about fifteen minutes.

MR. SHEINFELD: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. DAUCHER:

Q Is misconduct one of the more frequent issues that arises in connection with the type hearing that you are involved in supervising, Mr. Streett?

A Yes, it is a major issue. I don't consider [267] myself supervising hearing, but that is a major issue, yes.

Q What percent of the hearings, with a big "H," conducted by state involve the issue of misconduct, if you can estimate that?

A As I recall, it might be about 20 percent, but I am not sure of that amount. That is my best recollection.

Q Twenty?

A There are about five major issues; misconduct is one.

Q So the best you could estimate is 20 percent of the cases which reach the formal hearing stage involve a misconduct issue?

A That would be my best recollection. I am not certain of it, but it would be high.

Q I take it from your earlier testimony in response to a question by Mr. Ball where you stated that not all contracts, in fact most contracts of employment are not

writen—I believe you went on to say that some of them are not even oral.

A This is—

Q That must mean that there must be some implied terms of a contract of employment; is that right?

A I would think so, yes.

Q Would the terms to be implied in a contract of [268] employment vary by type of employer?

A This is conceivable, yes. I would say yes, definitely.

Q In other words, the terms which might be implied in a contract of employment between a church and a teacher that it employs to teach in a school might be different from the terms that might be implied into a contract between a trucking company and a truck driver?

A That's correct.

Q Is it also conceivable that the terms to be implied in a contract could differ between churches or between denominations? In other words, the terms of a contract between the Roman Catholic Church and its employees could be different from the terms of a contract, implied terms of a contract between the Lutheran Church and its employees?

A I would think yes.

Q In determining therefore what the contract is between the employer and the employee, the hearing examiner has to determine not only the written terms of the contract and the oral terms of the contract but also the implied terms of the contract, does he not?

A Generally, yes.

Q Let me give you a hypothetical question.

[269] Assume that a teacher is a member of the Missouri Synod of the Lutheran Church. Assume that that teacher is employed to teach mathematics by a Lutheran church in a Lutheran church school. Assume that the only evidence of any contract between the church and the teacher is either a writing or an agreed-upon oral conversation in which it was agreed that the teacher would

teach according to and obey in his or her personal life the doctrine of the church.

A I see.

Q That was the extent of the understanding.

A Okay.

Q The teacher is thereafter seen smoking.

A Okay.

Q Not at school; outside of the school.

A Okay.

Q The church discharges the teacher and says, "You violated your charge. It is against the doctrine of the church to smoke. You smoked; you are fired."

A Okay.

Q The teacher says, "You are wrong. That was against the doctrine of the church forty years ago; it is no longer against the doctrine of the church. It is now the doctrine of the church that I am allowed to smoke."

A Okay.

[270] Q We have a dispute between these two parties. In resolving that dispute would you, as a hearing officer, accept evidence of the following: First, that on every bulletin board in the school there was a sign that said, "Good Lutherans don't smoke."

Would you accept that evidence?

A Yes.

Q Would you admit that?

A Yes, I think so.

Q Suppose that there was evidence presented by the church that every month for the last ten years it sent a publication to each of its parishoners on the first page of which contained a list of commandments for good Lutherans, and one of the commandments was: "Good Lutherans don't smoke."

Would you accept evidence of that in the hearing?

A Perhaps, if the teacher was on the mailing list and received this.

Q All right. Let's assume that the teacher was not on the mailing list. Would you accept evidence of that?

A I would think not. I would think it is irrelevant, although our hearings are not governed by the exclusionary rules of evidence. And if something gets into the record, even though it is found to be irrelevant, it doesn't [271] do any real damage as long as the findings of fact are supported by good evidence.

Q Suppose that first peice of evidence—suppose that this Lutheran church has twenty bishops in the state of California and the church offers to produce each of those twenty bishops to testify that every good Lutheran knows that it is against church doctrine to smoke; that's been a firmly-held part of the church's doctrine for as long as we can remember and still is. They offer to produce those twenty.

Would you hear that evidence?

A Well, my answer would vary, depending upon whether or not there was some contact between the bishops and the claimant so that the—

Q No, my example assumes no contact.

A Okay. Then I would say no.

Q My example assumed—

A I'm sorry?

Q My example assumes that these twenty bishops would testify just exactly as I have said.

A All right.

Q That it has been the doctrine of the church—We are all twenty of the bishops in the Lutheran church in California, and it has been the doctrine of the church [272] for four hundred years and it is up to today that good Lutherans don't smoke."

Would you accept that evidence?

A I would think not. It is the understanding of the claimant as to what the doctrine of the church is, and I don't think this would show the understanding of the claimant.

Q I see. So the understanding of the church as to what its doctrine is is not nearly so important as the claimant's understanding?

A No, it is the common understanding between the employer and the employee, the church and the worker.

Q Well, that isn't what you just said a minute ago, and I want to find out which is true. We are not talking about a common understanding here because in the hypothetical we have assumed that there is no understanding, Mr. Streett.

A Okay.

Q That in fact they differ as to what the doctrine of the church is. You said a moment ago it is the understanding of the claimant that is important. Is that right?

A Yes, I would say that is right. If the claimant had no understanding that this is the doctrine of the church, whether or not the claimant was correct, is very, [273] very significant in a decision as to whether or not benefits would be allowed or denied under those circumstances, because the claimant has to understand—the claimant can make an error, can misunderstand the doctrine of the church. And this in and of itself could not conceivably be construed as misconduct; it is a simple error.

Q The point that I am getting at is, Mr. Streett, this point: If I were the lawyer for the church trying to persuade you to admit this testimony of twenty bishops, I would say: "It has to be relevant to the issue of whether this fellow could have made a mistake about the doctrine of the church—"

A Okay.

Q —"as to how widely that doctrine is publicized and how universally it is accepted."

Is that not true?

A I am not—I don't see where it is relevant.

I think this—that, as I said before: Any evidence is admissible, and if it plays into the—perhaps, if it plays into the witnesses,—

Q I am asking you. You are the hearing officer. Now would you accept my offer of that evidence? Would you allow me to put that evidence on?

A I guess so. I don't, I don't—if there is an [274] offer of proof, I would—You were saying that it may have some bearing on whether the witness understood what the doctrine was, and in that situation it would be desirable evidence to get into the record.

Q Just so that we don't misunderstand what one another is saying—

A Okay.

Q —my offer of proof would be that the Lutheran Church has twenty bishops in the state of California. Each one of the twenty bishops, I tell you, will come into your hearing room and testify that it has been the doctrine of the Lutheran Church for the past four hundred years and continues right up to today to be the doctrine of the church that good Lutherans don't smoke.

A Okay.

Q And that any member of the synod should know that. That is what they will testify to.

Now, that is what I offer to present in terms of evidence at this hearing that we are having. Do you accept it or not?

A Okay. It is not the doctrine so much but what you last said: "Any member of the synod should know that." Assuming the teacher is a member of the synod, and then it would—should be accepted, the evidence should be accepted. [275] Obviously the worker would have the opportunity to show that he or she didn't know this.

Q All right. Next piece of evidence.

I produce, I offer to produce three feet of literature produced by the Lutheran Church, Missouri Synod that is generally available at Missouri Synod churches and so forth that describes or purports to describe the doctrine of the church, each piece of which contains a reference to "No Smoking."

Do you accept that evidence?

A In the same vein: Assuming the worker is a member of the synod and would have access to these documents, certainly. It deals with the understanding of the worker's obligations.

Q Suppose that the claimant wants to bring in one of my twenty bishops—I have a defector now—who will testify as follows: "It was the doctrine of the Missouri Synod until last year that smoking was forbidden, but last year that was changed."

Would you permit that testimony?

A Yes, if the—for this reason: that the worker has an understanding that, you know, understands the doctrine of the synod to be something different. Not to establish the doctrine as such, though.

[276] Q But to establish whether the worker's understanding of the doctrine is reasonable or unreasonable?

A Not reasonable or unreasonable; whether the worker understood the doctrine. I'd rather put it that way.

Q Well, I understand how you'd rather put it.

A That is why we would do it.

Q But what I'm saying presumes no contact between this twentieth bishop and the claimant.

A Okay.

Q The twentieth bishop comes in and he says, "It is reasonable that a member of the Lutheran Church, Missouri Synod could have this view regarding smoking and the synod because it changed last year; not that I talked to this fellow or he was there when I preached a sermon about this or anything else, but it is reasonable for him to have held that view."

Would you allow that testimony?

A I don't think so. I would say not.

Well, let me mention this again: We are not bound by the exclusionary rules. I would presume that if the employer had the bishops come in and this would come in to rebut it, the testimony would be accepted.

But I think you might look at the use of the evidence. I think in sifting through the evidence, in [277] writing a decision, it would be rejected by the hearing officer.

Q So what you are saying is that in arriving at an understanding with respect to the claimant's view of what the doctrine of the church was, it would not—any evidence regarding the reasonableness of that view would be inadmissible?

A No, I don't—I am not saying that. Any evidence —the evidence needs to show what the claimant knew and understood.

Q But you are not answering my question, Mr. Streett.

A Okay. Would you repeat it, please.

Q Are you saying that evidence regarding the reasonableness of the claimant's view regarding what the doctrine of the church was would be inadmissible in such a hearing?

A Only—well, it would not be inadmissible but only to show what the claimant's view was. I don't—

Am I responding to your question?

Q Well, would the evidence of whether it was reasonable for him to hold this view of what the church doctrine was be admissible or not?

MR. SHEINFELD: Your Honor, I think that it is [278] confusing the witness by having Mr. Daucher continually use the word "admissible" when the witness has testified on several occasions that the rules of evidence do not apply in these hearings.

THE COURT: That witness understands what he is saying. Overruled.

BY MR. DAUCHER:

Q Would you like me to repeat my question?

A Yes.

THE COURT: Remember, Mr. Sheinfeld, you qualified the witness. You heard his background. He understands the question.

BY MR. DAUCHER:

Q Would you allow evidence at a hearing in a dispute between a church and a terminated church employee where the issue was whether the employee was properly terminated for misconduct involving smoking, evidence of whether the claimant's view regarding the church's position on smoking was one that the claimant could reasonably have held; to allow that kind of evidence to come into a hearing that you were conducting regarding eligibility for unemployment benefits?

A Yes. I would say that any evidence that shows, that would tend to show what the claimant's understanding [279] of the contract of employment actually was, should not only be admitted but considered by the hearing officer.

Q Okay. And evidence of what the church doctrine actually is would be evidence pointing towards that, would it not?

A Perhaps so. I would say yes.

Q Therefore, it would be incumbent upon a church in such a hearing held before you to come forward with as much evidence as it could to prove to you what its doctrine really was?

A If, in the understanding, in the context that this relates to the terms of hire, then I would say yes.

Q The Lutheran Church operates four synodical colleges to train teachers for its schools. That fact has been admitted in this case.

It's also been admitted that the Lutheran Church schools prefer graduates of those colleges to other persons as teachers in their schools.

Suppose that we have a particular Lutheran school in Los Angeles. Suppose that there are fiteen teaching positions open at that school and in 1979 the school can only locate thirteen synodical graduates to teach those schools and therefore hires two non-synodical graduates. But in 1980 they have an opportunity to fill those two [280] other positions with synodical graduates; termi-

nate the two non-synodical graduates, hire the two synodical graduates.

A Okay.

Q Would the terminated non-synodical graduates be eligible for unemployment compensation?

A Yes.

Q Are you familiar with whether or not the term "misconduct" in California includes incompetence?

A Yes, I am aware that it does not.

Q It does not?

A It does not in any state.

Q If a teacher at a Lutheran, Missouri Synod church school proved himself or herself incompetent to transmit the doctrine of the synod in the school, was terminated for that reason, would that person be eligible for unemployment compensation?

A Yes.

MR. DAUCHER: I have no further questions.

THE COURT: Anything futher? Mr. Sheinfeld?

[281] REDIRECT EXAMINATION

BY MR. SHEINFELD:

Q Mr. Streett, to what extent does the concept of willfulness become involved in adjudications in cases involving misconduct?

A To great extent. It generally turns on whether it was willful; that is part of the interpretation of misconduct.

Q So Mr. Streett, if I could return very briefly to a hypothetical that was posed by Mr. Ball involving the employee who was terminated because of "loss of religious fervor," in that situation one of the issues was the willfull nature of that loss of fervor.

MR. BALL: Objection, your Honor. That was not my hypothetical.

THE COURT: I know it wasn't. It didn't have the word "willfull" in it.

BY MR. SHEINFELD:

Q Mr. Streett, in the case of an employee who was terminated because of "loss of religious fervor," would the willfull nature of his conduct be an issue?

A Yes, it would.

Q In what way?

A At the beginning of employment he agreed that he would follow dictrines, religious doctrines that he or she [282] knew existed. And as I understood the question, there was a gradual deterioration in this to the point that the employer felt that it was necessary to discahrge the individual. And it was done willfully with the understanding that, willfully and knowingly with the understanding that the employment contract or that the agreement at the beginning was that there would be observance of these principles, these doctrines.

MR. SHEINFELD: Thank you very much.

I have no further questions.

THE COURT: Anything further?

MR. BALL: No, your Honor.

MR. DAUCHER: No, your Honor.

THE COURT: All right.

Thank you, Mr. Streett. You may step down.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 81-31

CALIFORNIA, ET AL., APPELLANTS

v.

GRACE BRETHREN CHURCH, ET AL.;

and

CALIFORNIA, ET AL., APPELLANTS

v.

LUTHERAN CHURCH-MISSOURI SYNOD, ET AL.

Appeal from the United States District Court
for the Central District of California

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is consolidated with case No. 81-228, *United States, et al.* v. *Grace Brethren Church, et al.* and case No. 81-455, *Grace Brethren Church, et al.* v. *United States, et al.* and a total of one hour is alloted for oral argument.

November 2, 1981

SUPREME COURT OF THE UNITED STATES

No. 81-228

UNITED STATES, ET AL., APPELLANTS

v.

GRACE BRETHREN CHURCH, ET AL.

Appeal from the United States District Court
for the Central District of California

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is consolidated with case No. 81-31, *California, et al. v. Grace Brethren Church, et al.* and *California, et al. v. Lutheran Church-Missouri Synod, et al.* and case No. 81-455, *Grace Brethren Church, et al.* v. *United States, et al.* and a total of one hour is alloted for oral argument.

November 2, 1981

SUPREME COURT OF THE UNITED STATES
No. 81-455

GRACE BRETHREN CHURCH, ET AL., APPELLANTS

v.

UNITED STATES, ET AL.

Appeal from the United States District Court
for the Central District of California

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is consolidated with case No. 81-31, *California, et al.* v. *Grace Brethren Church, et al.* and *California, et al.* v. *Lutheran-Missouri Synod, et al.* and case No. 81-228, *United States, et al.* v. *Grace Brethren Church, et al.*, and a total of one hour is allotted for oral argument.

November 2, 1981

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No. 81-31

IN THE

Supreme Court of the United States

October Term, 1981

GRACE BRETHREN CHURCH and
REVEREND DAVID L. HOCKING, etc., et al.,
Appellees,

v.

STATE OF CALIFORNIA, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, DIRECTOR OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,
Appellants.

THE LUTHERAN CHURCH-MISSOURI SYNOD, a Nonprofit Membership Corporation on Behalf of 85 Member Lutheran Churches, etc., et al.,
Appellees,

v.

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, THE DIRECTOR OF THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,
Appellants.

On Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM

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COUNTERSTATEMENT OF QUESTION PRESENTED

The District Court made findings of fact, based upon evidence unchallenged upon the trial, and conclusions of law, based upon the statute, that the benefit eligibility provisions of the California Unemployment Insurance Code, when applied to religious schools, create entanglements between government and religious bodies forbidden by the Establishment Clause of the First Amendment. Does the appeal from that judgment raise any substantial question not previously decided by the Supreme Court?

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No. 81-31

IN THE

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October Term, 1981

GRACE BRETHREN CHURCH and REVEREND DAVID L. HOCKING, etc., *et al.*,

Appellees,

v.

STATE OF CALIFORNIA, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, DIRECTOR OF CALIFORNIA EMPLOYMENT DEVELOPING DEPARTMENT,

Appellants.

THE LUTHERAN CHURCH-MISSOURI SYNOD, a nonprofit membership corporation on behalf of 85 member Lutheran Churches, etc., *et al.*,

Appellees,

v.

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, THE DIRECTOR OF THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

The appellees Grace Brethren Church and Reverend David L. Hocking, its pastor; Calvary Cross Church of the Highlands and Reverend Donald B. Sheeley, its pastor; Scott Memorial Baptist Church and Reverend Tim Lahaye, its pastor; Christian Unified Schools of San Diego; Redwood Christian Schools; Sidney Bowen and Patricia Bowen, his wife; Peter Farrelly and Sue Farrelly, his wife; William Tschantz and Janet Tschantz, his wife; Arthur Brandwood and Cheryl Brandwood, his wife; Stanley Edington; R. Florence Murti; and R. Suzanne Royer, respectfully move to affirm the judgment of the United States District Court for the Central District of California entered April 6, 1981, insofar as that judgment is challenged by this appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are correctly set forth in the Jurisdictional Statement.

COUNTERSTATEMENT OF THE CASE

Three types of religious organizations are involved in this case:

1. The religious schools (not separately incorporated) operated by the appellees Grace Brethren Church and Calvary Cross Church of the Highlands.

2. The religious schools (separately incorporated) operated by the appellee Scott Memorial Baptist Church (these schools also being the appellee Christian Unified Schools of San Diego).

3. The religious schools (separately incorporated and held by the court below to be not operated by any church or convention or association of churches) known as Redwood Christian Schools, an appellee here.

In their complaint herein the appellees raised statutory and constitutional objections to the imposition of the California Unemployment Insurance Code upon the appellee institutions. Count III of the complaint specifically attacked the benefit determination provisions of the Code as necessitating excessive entanglements between government and religious entities. Upon trial in the District Court, the defendant United States Department of Labor presented, as expert witnesses, two employees of the Department who testified at length with respect to the benefit determination process. T. 153-282.[1] The witness Ernest L. Carter identified himself as "an unemployment insurance program specialist" who furnishes "technical assistance to the states interpreting federal law, federal requirements in unemployment insurance." *Id.* at 154. The witness stated that he was involved in "determina-

1. Transcript, August 13, 1980.

tions of eligibility under state law regarding discharge [and] refusals of employment." *Id.* at 155. Testifying that the unemployment insurance program is a "federal-state program", he stated that it was the job of his office "to ensure that the state agencies comply with the federal standards" with respect to benefit determinations. *Id.* at 160. Counsel for the federal goverment asked the witness a series of questions as to how determinations are made where the employee of a religious school is discharged on religious or moral grounds. Extensive cross-examination followed. The federal government's second witness was Bernard Streett, Supervisor of the Appeals Unit for Unemployment Insurance Service, Employment and Training Administration, U. S. Department of Labor. He testified "as an expert on the issue of the federal standards for adjudication of claims in formal hearings before state unemployment insurance agencies." *Id.* at 227. He stated that it is the function of his office "to monitor the nature of the hearing processes that take place in the states and how those processes function." *Id.* at 225. His testimony then dealt extensively with the application of federal guidelines to cases (in the states) involving benefit determinations where employees of religious schools are discharged on religious or moral grounds. *Id.* at 232-282.

At no time did the State of California object to the questions propounded to these witnesses; nor did California offer any witnesses in order to present testimony to show that the benefit determination processes in California differ significantly from those contained in the federal guidelines, in particular in respect to cases involving employees discharged from religious schools.

The District Court looked to the terms of the applicable federal and California statutes, 26 U. S. C. § 3304(a)(10) and § 1256 of the California Unemployment Insur-

ance Code, noting that, by their terms, "an employee . . . is disqualified from receiving the benefits to which he would otherwise be entitled if he is discharged for misconduct." Jurisdictional Statement, App. A. 26. The court found the resulting "involvement of secular officials in religious disputes" (in benefit determination processes relating to religious schools) to be "inevitable". *Id.* at 30. The court found confirmation of this in the aforementioned testimony of the federal expert witnesses. *Id.* at 27-30. The District Court thus concluded that the Establishment Clause, due to excessive entanglements, bars the application to religious schools of the unemployment compensation tax scheme. *Id.* at 33.

ARGUMENT

This case presents no substantial question which has not been previously decided by this Court. Under prior decisions of this Court, the decision of the District Court was eminently correct.

Appellants argue: (1) that the evidence produced at trial does not support the District Court's finding of excessive entanglements arising from the benefit eligibility determination process. *Id.* at 13. (2) That "the church group appellees' objections to the benefit eligibility determination process are purely speculative" (in relation to forbidden entanglements) in light of certain decisions of the Supreme Court. *Id.* at 14-22.

1. Appellants are tardy in attempting to improve, from their point of view, the trial record. The unemployment compensation program is a federally controlled program.[2] Upon the trial the federal government presented expert testimony to show how the Department of Labor considers the benefit determination process to work in all fifty states and how the Department furnishes training to state unemployment compensation officials in the requirements of federal law—and in particular with respect to the benefit determination process. T. 153-282.

The appellants did not object to this testimony. The appellants, with full opportunity to do so, presented no

2. The United States Secretary of Labor is required to approve the law of any state participating in it, 26 U. S. C. § 3304(a), and each year he must certify to the Secretary of the Treasury each state whose law he has previously approved (26 U. S. C. § 3304(c)), and can decertify any state which has failed to comply with certification requirements. 26 U. S. C. § 3304(c), (d). Credit against the federal tax imposed by the Federal Unemployment Tax Act, for contributions made to state unemployment compensation funds, is dependent upon the aforementioned federal certification. 26 U. S. C. § 3302(a).

evidence whatever to show that California conducts the benefit determination process outside the federal guidelines and in ways which can involve no forbidden entanglements. The appellants complain that the federal expert witnesses had never *personally* conducted a benefit eligibility hearing involving a church employee. But the appellants, upon the trial, never raised a question as to the relevance, expertise or competency of the testimony of those witnesses.

The District Court most justifiably relied in part upon the federal experts' testimony. Jurisdictional Statement, App. A, 27-29. But it based its conclusion respecting entanglement *also* upon what it regarded as the "*inevitable*" effect of the operation of the statute. So far, therefore, as appellants complain that the record evidence does not support the District Court's conclusion they raise a matter of no substance whatsoever.

Appellants, in this part of their argument, also seek to make it appear that appellees have challenged solely the "tax side" of the program (imposition of the unemployment insurance tax) and not the "award of benefits" side (determination of benefits eligibility). Appellees then argue that the former "side" should be considered independently of the latter "side"; hence, so they say, the Court should disregard the potential constitutional questions which benefit determination proceedings might pose where church-related school employees are involved. Jurisdictional Statement, 14-16. The complaint, however, challenged the imposition of the statute upon the religious entities *in its every aspect*, and the District Court recognized that and likewise properly dealt with both "sides" of the statute. This argument of appellants plainly raises no question of substance.

2. Finally, appellants argue that no excessive entanglements are necessitated in the statutory benefit eligibility

determination process because whether an employee was discharged for misconduct would depend simply upon whether he or she knowingly failed to abide by an "established work rule" (which could incorporate religious requirements). The inquiry in such case would be "purely secular" (what was the "work rule" and was it knowingly violated?). The church property cases (*Jones v. Wolf*, 443 U. S. 595 (1979), etc.), so appellants argue, permit precisely that kind of inquiry. Jurisdictional Statement, 16-22.

Appellants' attempt to reduce to a "work rule" the requirements of religious faith (in the setting of an employment by a religious ministry) calls for a vast oversimplification of the factors involved.[3] The District Court pointed to the two prime defects of this approach:

3. In footnote 5 of the Jurisdictional Statement at Page 17, appellants point to Title 22 of the California Administrative Code, Section 1256-36(b)(1), which lists a series of situations in which an employee is *not* required to comply with a "work rule" regardless of its terms. The prospect of these situations but broadens the vista of unconstitutional entanglements necessarily presented by the application of the statute to religious ministries. For example, under Situation 2, in the footnote, the employee's noncompliance with the "work rule" would be based on its imposing "a new and unreasonable burden upon the employee." If that burden consisted of a religious duty, the state would determine whether that religious duty was an "unreasonable" burden. Similar potential entanglements are found in Situations 3, 5 and 6. In the hope of avoiding the entanglement issue, the appellants are careful to state that "the context in which an employee is not required to comply with a work rule under the above regulation is determined solely according to secular standards." This makes the effect even worse constitutionally: if the religious ministry insists that the "work rule" is not unreasonable because it is religiously required, the state may not hear of that: it must apply solely "secular standards"—thus effectively wiping out the religious claim.

"First, it underestimates the complexity of religious faith. In effect, the Secretary's approach requires religious schools wishing to make adherence to religious doctrine a condition of employment to develop and explain to prospective employees detailed, all-encompassing articles of religious belief. Such a task could never be accomplished. It should be obvious that not all doctrinally-based 'implied work rules' can be prescribed in advance; nor can religious ideals like 'fervor,' which may be satisfied or breached by infinitely varied patterns of conduct, be precisely defined.

"Second, the adoption of a rule making the employee's subjective understanding of his employment terms decisive would embroil the hearing examiner in credibility questions which can only be resolved by involvement in religious issues. For example, the fundamentalist school principal confronted with a claim by a teacher fired for advocacy of a particular doctrine or practice that his understanding of fundamentalist doctrine did not require opposition to that doctrine or practice might well wish to challenge the credibility of the teacher's assertion by establishing that such opposition *really is* mandated by fundamentalist doctrine and that alleged ignorance of that fact *must* be feigned. Similarly, a teacher fired ostensibly for religious reasons might wish to show that the religious reasons advanced for the discharge were a pretext by showing that the reasons asserted were not an accurate statement of the tenets of fundamentalist faith. In short, there are so many ways in which doctrinal questions could become material to benefit eligibility determinations that decisions on religious issues by secular administrators is, in this Court's opinion, inevitable if fundamentalist schools

> typified by some of the plaintiffs in the Grace Brethren case are subjected to the benefit determination process." A. 29-30.

To be noted here is the warning of the Supreme Court respecting the right of religious bodies to "establish their own rules and regulations for internal discipline and government . . ." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U. S. 696, 724 (1976).

The District Court's conclusion, that the benefit eligibility determination process inevitably involves secular officials in religious disputes and thus "runs afoul of the constitutional prohibition against excessive entanglement between the state and religion", is the most obvious of conclusions arising out of the now settled principles laid down in this Court's decisions on church-state separation (*e.g.*, *Walz v. Tax Commission*, 397 U. S. 664 (1970); *Lemon v. Kurtzman*, 403 U. S. 602 (1971); *Serbian Eastern Orthodox Diocese v. Milivojevich*, *supra*). No further review of the District Court's decision is conceivably warranted.

CONCLUSION

Wherefore, appellees respectfully submit that appellants present no substantial question for the decision of this Court, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 81-31

IN THE

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October Term, 1981

GRACE BRETHREN CHURCH and REVEREND DAVID L. HOCKING, etc., *et al.*,

Appellees,

vs.

STATE OF CALIFORNIA, *et al.*,

Appellants.

THE LUTHERAN CHURCH-MISSOURI SYNOD, etc., *et al.*,

Appellees,

vs.

STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, *et al.*,

Appellants.

On Appeal from the United States District Court for the Central District of California.

MOTION TO AFFIRM.

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IN THE

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Appellees,

vs.

STATE OF CALIFORNIA, *et al.*,

Appellants.

THE LUTHERAN CHURCH-MISSOURI SYNOD, etc., *et al.*,

Appellees,

vs.

STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, *et al.*,

Appellants.

MOTION TO AFFIRM.

Appellees, The Lutheran Church-Missouri Synod ("the Synod") on behalf of its eighty-five member churches, St. John's Lutheran Church, and Vivadell Keiser (collectively, "the Lutheran appellees") respectfully move the Court for an order affirming the judgment entered in this action on April 6, 1981, by the United States District Court for the Central District of California. The grounds for this motion to affirm are that:

1. Any questions regarding the proper construction of the statutes in question have been rendered unsubstantial by the decision of the Court in *St. Martin Evangelical Lutheran Church v. South Dakota*, ... U.S. ..., 101 S.Ct. 2142 (1981); and

2. Appellant has specifically disclaimed any intention of bringing before the Court the question of statutory construction.

The decision of the District Court in favor of the Lutheran appellees on the issue of statutory interpretation therefore must be affirmed.

Insofar as the constitutional basis for the decision of the District Court is challenged by this appeal, these appellees join in the Motion to Affirm submitted by appellees Grace Brethren Church, *et al.* on August 3, 1981.

Constitutional Provisions and Statutes Involved.

The pertinent constitutional provisions and statutes are set forth correctly in the Jurisdictional Statement filed by the State of California.

Counterstatement of the Case.

The Synod is a non-profit membership corporation whose members are Lutheran congregations, a number of which operate primary or secondary schools. One such congregation is appellee St. John's Lutheran Church. Appellee Vivadell Keiser was a teacher at St. John's Lutheran Church when this litigation commenced.

The Lutheran appellees sought declaratory and injunctive relief against the application of the *California Unemployment Insurance Code* to schools operated, supervised and controlled by member congregations of the Synod. The Lutheran appellees sought to enjoin the collection of the tax as well as the collection of information used by the State in imposing the tax. The Lutheran appellees argued that the

schools operated by Synod members were exempt from the tax, not only on statutory grounds but also because the imposition of unemployment insurance coverage upon those schools contravened their rights under the First and Fourteenth Amendments to the United States Constitution.

The action brought by the Lutheran appellees was consolidated for trial with a similar action brought by the Grace Brethren Church, its pastor, the Christian Unified Schools of San Diego, the Redwood Christian Schools, and a number of individuals variously associated with the foregoing ("the Grace Brethren appellees"). Following trial of this matter, the District Court rendered findings of fact and conclusions of law in favor of plaintiffs in the consolidated cases.

The District Court found as to the Lutheran appellees that all of their schools were either without a separate legal existence from the churches by which they were operated ("Category I") or were operated as separate corporations by a church or association of churches ("Category II"). These two categories of schools, the Court concluded, were exempted from the unemployment tax scheme by the plain meaning of the statute under consideration. (Jurisdictional Statement, App. C, p. 49, App. E, p. 71.)

As to the schools operated by the Grace Brethren appellees, the District Court found that some of those schools fell into a third category. The so-called "Category III" schools are religious in purpose and orientation, but are not associated with any particular church or religious denomination. (Jurisdictional Statement, App. E, p. 71.) The Court concluded that the Category III schools were not exempted by virtue of the "plain meaning" of the California statute but held that to apply the statute to them would result in entanglement between Church and state forbidden by the First Amendment to the United States Constitution. (Jurisdictional Statement, App. B, pp. 45-46.)

The United States of America[1] and the State of California appealed directly to this Court[2] from the holding of the District Court that Federal Unemployment Tax Act section 3309[3] and *California Unemployment Insurance Code* section 634.5 were unconstitutional as interpreted and applied. Neither appellant challenged the judgment of the District Court insofar as it was based upon statutory grounds.[4]

---

[1]The appeal by the United States of America has been docketed in this Court as Case No. 81-228. The Lutheran appellees were listed as appellees in the Notice of Appeal filed by the United States, but the United States apparently dropped the Lutheran appellees from the case when the Jurisdictional Statement was filed. Hence, the instant motion to affirm is directed only to the Jurisdictional Statement filed by the State of California.

[2]Pursuant to 28 U.S.C. §1252.

[3]26 U.S.C. §3309.

[4]See Argument §2 and note 5 *infra*.

ARGUMENT.

1. Any Issues Regarding the Proper Construction of the Statutes in Question Are Not Substantial.

Consideration of the statutory construction issues has been rendered unnecessary by the recent decision of the Court in *St. Martin Evangelical Lutheran Church v. South Dakota*, ... U.S. ...., 101 S.Ct. 2142 (1981). The questions concerning the interpretation of section 3309 of the Federal Unemployment Tax Act (and, effectively, *California Unemployment Insurance Code* section 634.5) were decided by the Court in that case. "This disposition renders the merits in the present case a decided issue and thus one no longer substantial in the jurisdictional sense." *Norton v. Mathews*, 427 U.S. 524, 530-31 (1976). Therefore, the decision of the District Court on the issues of the proper construction of the statutes in question must be affirmed.

2. Appellant Has Specifically Disclaimed Any Intention of Bringing Before the Court the Question of Statutory Construction.

In its Jurisdictional Statement, the State of California specified that

> Appellants appeal only from that portion of the judgment which finds impermissible and excessive entanglement with religion in the benefit eligibility determination process with respect to employees of religious schools . . . . [T]wo church group appellees (Christian Unified Schools of San Diego and Redwood Christian Schools) prevailed at the trial level only because of the District Court's favorable holding on this issue. (Jurisdictional Statement at pp. 11-12.)

The State continued: "Appellants have consistently agreed with the position of the church group appellees insofar as they sought declaratory relief on purely statutory

grounds. *The holding of the District Court is completely in accord with appellants' position.*" (Jurisdictional Statement at p. 12.) (Footnote omitted. Emphasis supplied.)

The appeal by the State of California is taken solely from the holding of the District Court that the Federal Unemployment Tax Act section 3309 and *California Unemployment Insurance Code* section 634.5 are unconstitutional as interpreted and applied with respect to the benefit eligibility determination process. That holding affects the result only as to two school groups in the Grace Brethren action. The District Court found that the schools operated by Synod members are exclusively Category I and Category II schools and thus exempted from payment of the tax by virtue of the plain meaning of the statute language. Inasmuch as the Court's holding in the Lutheran case was based upon the District Court's interpretation of the statutes under consideration rather than the holding on the issue of constitutionality, the instant appeal has no effect upon the decision of the District Court in the Lutheran case, a proposition that the United States of America has recognized.[5]

---

[5]The United States chose not to appeal the District Court's construction of the statutes. In footnote 2 to his Jurisdictional Statement in Case No. 81-228, the Solicitor General states:

> Although this case was consolidated with *Lutheran Church-Missouri Synod v. California Employment Development Department*, No. CV 79-162 MRP, for decision below, only the instant case involves Category III schools. . . .

At footnote 5 he continues:

> We do not ask this Court to review the district court's conclusions concerning the applicability of the statutory exemptions to Category I and Category II schools. The decision that Category I schools are exempted from FUTA is clearly correct under *St. Martin Evangelical Lutheran Church v. South Dakota, supra*. After careful consideration of the relevant legislation, the Secretary of Labor has concluded that Congress intended to treat Category I and Category II schools alike, and thus does not wish to challenge the conclusion that Category II schools are also exempt under the statutory scheme. We accordingly do not ask this Court to review the *Lutheran Church* case, which involves only Category I and Category II schools. . . .

Therefore, the judgment of the District Court as to these appellees must be affirmed.

Respectfully submitted,

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Nos. 81-31, 81-228 and 81-455

IN THE

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STATE OF CALIFORNIA, *et al.*,

Appellants,

vs.

GRACE BRETHREN CHURCH, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Amended Brief of Appellants, State of California, California Employment Development Department, and the Director of the California Employment Development Department.

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Questions Presented.

1. Whether the Court's jurisdiction is properly invoked under 28 U.S.C. § 1252.

2. Whether 26 U.S.C. § 3309(b)(1) and California Unemployment Insurance Code § 634.5(a) as interpreted and applied result in excessive entanglement of the state with religion in the benefit eligibility determination process with respect to employees of religious schools and thus are incompatible with the religion clauses of the First and Fourteenth Amendments.

3. Whether a violation of the Free Exercise Clause results from the inclusion of employees of religious schools in the unemployment compensation program.

4. Whether a denial of equal protection results from the inclusion of employees of unaffiliated religiously oriented schools in the unemployment compensation tax program.

5. Whether 28 U.S.C. § 1341 deprived the District Court of jurisdiction of this action.[1]

---

[1]The plaintiffs in Case No. CV 79-93MRP (hereinafter referred to as the "Grace Brethren case") are:

Grace Brethren Church of Long Beach, California, and its pastor, Rev. David L. Hocking; Calvary Cross Church of the Highlands of San Bruno, California, and its pastor, Rev. Donald B. Sheley; Scott Memorial Baptist Church of San Diego, California, and its pastor, Rev. Tim LaHaye; Christian Unified Schools of San Diego, an incorporated association of five fundamentalist schools with a central office in El Cajon, California; Redwood Christian Schools, an incorporated association of four fundamentalist schools with a central office in Castro Valley, California; Sidney and Patricia Bowen of Compton, California, whose children attend Grace Christian Schools, an affiliate of plaintiff Grace Brethren Church; Peter and Sue Farrelly of Pacifica, California, whose children attend Highlands Academy, an affiliate of plaintiff Calvary Cross Church of the Highlands; William and Janet Tschantz of LaMesa, California, whose children attend plaintiff Christian Unified Schools of San Diego; Arthur and Cheryl Brandwood of Hayward, California, whose children attend plaintiff Redwood Christian Schools; Stanley Eddington of San Lorenzo, California, a teacher at plaintiff Redwood Christian Schools; R. Florence Murti of Daly City, California, a teacher at Highlands Academy; and R. Suzanne Royer of Long Beach, California, a teacher at Grace Christian Schools.

The defendants in the "Grace Brethren Case" — Case No. 79-93MRP are:

The State of California; The California Employment Development Department; The Director of the California Employment Development Department; The United States of America; The United States Department of Labor; and the United States Secretary of Labor.

The plaintiffs in Case No. CV 79-162MRP (hereinafter referred to as the "Lutheran case") are:

The Lutheran Church-Missouri Synod, a nonprofit membership corporation on behalf of the eighty-five of its member churches which operate primary or secondary schools; St. John's Lutheran Church, a member of plaintiff Lutheran Church-Missouri Synod and operator of a primary school in Orange, California; and Vivadell Keiser, a teacher at the primary school operated by plaintiff St. John's Lutheran Church.

The named defendants in the "Lutheran Case" — Case No. CV 79-162MRP are:

The California Employment Development Department; The Director of the California Employment Development Department; and The United States Secretary of Labor.

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GRACE BRETHREN CHURCH, *et al.*,

Appellees.

Amended Brief of Appellants, State of California, California Employment Development Department, and the Director of the California Employment Development Department.

OPINIONS BELOW.

The Opinion of the United States District Court for the Central District of California for both cases is entitled Second Supplemental Opinion and is not presently reported. A copy of said Opinion is attached to the State of California's Jurisdictional Statement as Appendix A, pp. 1-44. (State J.S. App. A, pp. 1-44.) The Order and Judgment in the Grace Brethren case appears as Appendix B to the State's Jurisdictional Statement. (State J.S. App. B, pp. 45-48.) The Order and Judgment in the Lutheran case appears as Appendix C to the State's Jurisdictional Statement. (State J.S. App. C, pp. 49-51.) The District Court's two earlier Opinions at the preliminary injunction stage entitled Opinion and Supplemental Opinion are likewise not presently re-

ported. (State J.S. App. D, pp. 51-70 and State J.S. App. E, pp. 71-79.) Copies of the corresponding Orders appear as Appendices F and G, respectively, to the State's Jurisdictional Statement. (State J.S. App. F, pp. 80-81 and State J.S. App. G, pp. 82-83.)

JURISDICTION.

Both suits were brought in the District Court[2] on behalf of the respective plaintiffs for injunctive and declaratory relief under the authority of 28 U.S.C. § 1331 as the suits involved substantial questions as to the interpretation and constitutionality of the Federal Unemployment Tax Act. ("FUTA"; 26 U.S.C. §§ 3301, *et seq.*) Jurisdiction was further invoked in the Grace Brethren case under 42 U.S.C. § 1983, 28 U.S.C. §§ 1343, 1346, 2201 and 2202.

The judgments of the District Court were entered on April 6, 1981. (State J.S. App. B, pp. 45-58; App. C, pp. 49-51.) The State appellants filed a Notice of Appeal to this Court from each judgment on May 6, 1981. (State J.S. App. H, pp. 84-87; App. I, pp. 88-91.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

---

[2]The Lutheran case was originally brought in the Superior Court of the State of California for the County of Los Angeles and was subsequently removed by the federal defendants to the United States District Court for the Central District of California pursuant to 28 U.S.C. §§ 1441 and 1442. The Lutheran case was ultimately consolidated with the Grace Brethren case in that court.

and to petition the Government for a redress of grievances."

Fifth Amendment, United States Constitution:

"[Section 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

26 U.S.C. § 3309(b):

"This section shall not apply to service performed —

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; . . ."

California Unemployment Insurance Code § 634.5 (West Supp. 1981):

> "Notwithstanding any other provision of this code or any other code or law, no provision of this code or any other code or law excluding service from 'employment' shall apply to any public entity defined by Section 605 or to any nonprofit organization described by Section 608, except as provided by this section. With respect to any public entity defined by Section 605 or any nonprofit organization described by Section 608, 'employment' does not include service excluded under Sections 629, 631, 635, and 639 to 648, inclusive, or service performed in any of the following:
>
> (a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches . . ."

28 U.S.C. § 1341 provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

STATEMENT OF THE CASE.

This litigation involves the challenge by various California churches, religiously oriented schools and individuals to the coverage of both church and school employees under the federal-state unemployment compensation tax program.[3]

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[3]The plaintiffs will be referred to as the "Grace Brethren appellees" and "Lutheran appellees" when separately discussed and simply "appellees" otherwise.

Appellees sought both declaratory and injunctive relief against the State[4] and the United States[5] The dispute arose chiefly between the appellees and the United States over whether services performed at schools operated by the appellees should be subject to unemployment taxation.[6]

The appellees contended and sought a declaration that such services were not subject to unemployment taxation on purely statutory grounds and in the alternative on the grounds that to impose unemployment insurance coverage upon them would be violative of their rights protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

The State agreed with the position of the appellees insofar as they sought declaratory relief on the purely statutory grounds and in fact cross-claimed against the United States seeking comparable declaratory relief. However, the State disagreed with the declaratory relief sought on any of the constitutional grounds.

The appellees also sought to enjoin the collection of unemployment information and tax, as well as disability information and tax by the State and to enjoin the United States from taking any action to compel the State to collect the unemployment insurance tax. The grounds were the

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[4]"State" refers to State of California, California Employment Development Department and the Director of the California Employment Development Department.

[5]"United States" refers to the United States of America, the United States Department of Labor and the United States Secretary of Labor.

[6]It should be noted that disability taxes under California law were also involved in these actions since in California, covered services for unemployment insurance purposes are the same as covered services for disability insurance purposes. California Unemployment Insurance Code § 2606. The issue in this appeal is however limited to the unemployment insurance aspect of the case.

same as those alleged in support of the request for declaratory relief.

The State opposed the issuance of injunctive relief on any grounds in that California law prohibits the enjoining of the collection of a tax. California Constitution, Article XIII, Section 32. The United States opposed all relief and filed both a Motion To Dismiss the appellees' Complaints and a Motion To Dismiss the State's Cross-Claim.

In opinions and orders filed on September 21, 1979, and June 2, 1980, (State J.S. App. D, E, F and G, pp. 51-83) the District Court granted the United States' Motion To Dismiss the State's Cross-Claim, denied the United States' Motion To Dismiss the appellees' complaints and granted appellees' motion for preliminary injunction against the State alone for all but two of the appellees.[7] The State

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[7]The District Court separated the employees who perform services for the schools involved herein into three categories:

Category 1: Those who are in the employ of a church or convention or association of churches.

Category 2: Those who are in the employ of a separate corporation formed by a church or a convention or association of churches.

Category 3: Those who are in the employ of a corporation which is operated primarily for religious purposes, but which is not operated, supervised, controlled or principally supported by a church or convention or association of churches, *i.e.*, an independent, non-church affiliated religious school.

(State J.S. App. E, p. 71.)

The two appellees who were not successful at the preliminary injunction stage were Redwood Christian Schools and Christian Unified Schools of San Diego. These were the only "category 3" religious organizations involved in the case. However, there was testimony by Mr. Ellis P. Murphy, director of legislative and legal services for the Association of Christian Schools International that approximately twenty (20) percent of its member schools in California (636) are "category 3" types. (R.T., p. 120 — R.T. refers to Reporter's Transcript of proceedings before Hon. Mariana R. Pfaelzer on August 12-13, 1980.) Furthermore, it was estimated that there are currently (Fall, 1979) 1589 religiously related schools in California. (State's Notice of Motion; Motion For Order Establishing Class Action, etc., p. 20.)

appealed to the Ninth Circuit from the Order granting the United States' Motion To Dismiss the State's Cross-Claim and later withdrew said appeal. (Case Nos. 79-3784 and 79-3785.) The United States also appealed the District Court's preliminary rulings to the Ninth Circuit. Its appeal was from the Order granting appellees' request for a preliminary injunction. This appeal was likewise dismissed. (Case Nos. 79-3763 and 79-3764.)

At the preliminary injunction stage, although concluding that the Secretary of Labor's interpretation of 26 U.S.C. § 3309(b) imposed upon the States and embodied in Program Letter No. 39-78 (State J.S. App. J, pp. 92-96) was both erroneous as a matter of statutory construction and as inconsistent with the constitutional prohibition against excessive state entanglement with religion, the District Court did not pass on the precise question presented by the State's appeal. (State J.S., p. i.)

Benefit Eligibility Hearings.

The question raised in the State's appeal was first considered at length at the subsequent trial. The appellees presented no evidence to demonstrate that there ever had been a benefit eligibility determination hearing with respect to an employee of a church-related school. Moreover, there was no evidence presented by the appellees that there had ever been a benefit eligibility hearing where the issues either involved a dispute concerning a church or other religious organization with respect to the reasons for discharge of the employee by the church or religious organization or a dispute which required an inquiry into church doctrine.

The only evidence at the trial pertaining to the issue was hypothetical questions posed to two witnesses for the United

States and their responses thereto.[8] Although each witness was experienced in the field of benefit eligibility determination hearings and in fact supervised State programs, both witnesses testified that they had never conducted, attended nor read a transcript of a benefit eligibility hearing from any State where the issues involved a dispute between a church and church employee with respect to the reasons for discharge of the employee by the church. (R.T., p. 165, lines 6-12; R.T., p. 166, lines 13-17; R.T., p. 228, line 15; R.T., p. 231, line 13; R.T., p. 231, line 14; R.T., p. 232, line 14.)

The first federal witness, Mr. Carter, testified that his job is to furnish technical assistance to the states in interpreting federal law and requirements in predetermination benefit eligibility hearings. (R.T., pp. 154-155.) He testified that he conducts training courses in this area for the states (R.T., p. 155) and that there are general federal guidelines provided to the states for proceeding when the issue is misconduct or voluntary leaving. (R.T., p. 175.) However, he continued that there are no particular federal guidelines with respect to misconduct in situations arising in religious schools. (R.T., p. 175.) Mr. Carter indicated that ultimately the decision would be a matter of state law and policy, (R.T., pp. 175, 214-216) and further, that he did not know the specific definition of misconduct in California (R.T., p. 202).[9] Finally, Mr. Carter testified on cross-examination that in 1979 approximately 4 million cases were adjudicated

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[8]The two witnesses were Ernest L. Carter and Bernard Streett. Their testimony appears at R.T., pp. 153-221, and R.T., pp. 222-282, respectively.

[9]There was in fact no evidence presented at trial regarding California or any other state's actual manner of conducting the hearings supervised either by Mr. Carter or Mr. Streett.

nation-wide involving voluntary leave or misconduct issues. (R.T., pp. 191-194.)

Mr. Streett testified that he is the supervisor of the appeals unit for the United States involving benefit eligibility hearings after benefits have been denied. (R.T., pp. 222-226.) His function is to review and offer guidance and assistance to state programs. (R.T., p. 224.) His office evaluates the quality of the states' benefit eligibility hearings and offers a training program in hearings and decision writing to the states. (R.T., p. 228.) He further testified that federal guidelines are provided to the states as to how these particular hearings should be conducted and how particular fact patterns may be adjudicated. (R.T., pp. 226-227.) Mr. Streett testified that the guidelines are general, intended to cover all hearings, and that they do not specifically refer to church employees and church institutions. (R.T., p. 232.)

Burden of Unemployment Compensation Tax Program on Appellees.

At trial, the Grace Brethren appellees presented testimony by Mr. Enderlin, the superintendent of Redwood Christian Schools (one of the Grace Brethren appellees) and Mrs. Brandwood, a parent of students attending Redwood Christian Schools. Mrs. Brandwood is also a Grace Brethren appellee. Both witnesses' testimony pertained to their reasons for opposing the inclusion of Redwood Christian Schools in the federal-state unemployment compensation tax program and in particular to the burden such program would place upon them. (R.T., pp. 7-82; 113-115.)

Mr. Enderlin testified that a very important reason his school was opposed to the imposition of the unemployment compensation tax is the financial aspect of the program. (R.T., pp. 43-45.) Mr. Enderlin testified that with respect to minimum wage and workers' compensation laws his

school would not comply with those laws if the cost of compliance rose to a point above that which would be acceptable to the school. (R.T., pp. 40-42; 70-73.) In addition, with respect to fire, safety, sanitation and health regulations imposed by governmental bodies, Mr. Enderlin indicated that his school did not oppose such regulations because they help to advance the school's religious mission and because there had not yet been any unreasonable demands. (R.T., pp. 30-31.)

Mr. Enderlin also testified that his schools have a disability insurance program for its employees (R.T., pp. 50-52), the schools do not participate in social security (R.T., p. 36), and they do not receive any form of local, state or federal financial assistance. (R.T., p. 36.)

Mrs. Brandwood testified that her opposition to the imposition of the unemployment compensation tax was financially related in that her tuition would have to increase in the event the program was extended to cover Redwood Christian Schools. (R.T., p. 115.) She also indicated that she felt that the imposition of the tax might lead to unfavorable teachers being allowed to teach at the school. (R.T., p. 115.)

The District Court's Decision.

Following the submission of post-trial briefs, the District Court held *inter alia* that excessive entanglement of church and state was inevitable during the benefit eligibility determination process if religious schools were brought within the scope of the unemployment compensation tax program. Therefore, the District Court concluded that both 26 U.S.C. § 3309(b) and California Unemployment Insurance Code § 634.5(a) were unconstitutional as applied. (State J.S. App. A, pp. 25-33, 44 footnote 39; App. B, pp. 45-48; App. C, pp. 49-51.)

The District Court also concluded in its Second Supplemental Opinion that no violation of the Free Exercise Clause results from the inclusion of employees of religious schools in th unemployment compensation tax program because the burden or injury complained of by the appellees was purely financial in nature. (State J.S. App. A, pp. 16-25.)

Finally, the District Court declined to reach the merits of the Grace Brethren appellees' equal protection argument since the Court had already determined that application of the unemployment compensation tax program to their employees involved impermissible entanglement of the state with religion. (State J.S. App. A, pp. 33-35.)

SUMMARY OF ARGUMENT.

This Court has jurisdiction of this appeal under 28 U.S.C. § 1252 because the *basis* of the District Court's decision was that both 26 U.S.C. § 3309(b) and California Unemployment Insurance Code § 634.5(a) were unconstitutional as applied to the appellees. The District Court was fully cognizant of the interplay between state and federal unemployment compensation tax programs. The only evidence before the District Court pertained to general *federal* guidelines regarding the benefit eligibility hearings and not specifically California procedures.

No potential for excessive entanglement in the benefit eligibility determination process was demonstrated by the appellees. The evidence produced at trial was far too speculative to support the District Court's contrary conclusion. The focus in a benefit eligibility hearing is upon the activities of the employee and whether there was a wilful violation of an established work rule. The religious beliefs of the respective parties is irrelevant as is whether the given work rule conforms to church doctrine. The benefit eligibility determination process is constitutional under the standards

set forth in the church property dispute cases decided by this Court.

No violation of the Free Exercise Clause results from the inclusion of employees of religious schools in the unemployment compensation tax program. There is no constitutional right to exemption from taxes for appellees. As the only burden or injury complained of by the appellees was purely financial in nature, when balanced against the important public policy served by the unemployment compensation tax program, the conclusion is compelled that no Free Exercise rights are violated.

No violation of the Equal Protection Clause results from the inclusion of employees of unaffiliated religiously oriented schools in the unemployment compensation tax program. A classification of employers according to church affiliation rather than by religious mission or curriculum content avoids potential impermissible governmental entanglement. The classification of employers set forth in 26 U.S.C. § 3309(b) and California Unemployment Insurance Code § 634.5(a) reflects a congressional attempt to accommodate sincerely held religious beliefs against the need of their employees for protection against wage loss in much the same way as 26 U.S.C. § 1402(g).

The United States was an indispensable party to these actions in that without its joinder appellees could not have obtained complete relief. Therefore, as the United States cannot be compelled to submit to state court jurisdiction, the state remedy for appellees was not plain, speedy and efficient for purposes of 28 U.S.C. § 1341.

ARGUMENT.

I.

Introductory Statement.

The State has appealed from that portion of the District Court's judgment which finds impermissible and excessive entanglement with religion in the benefit eligibility determination process with respect to religious schools. (Second Supplemental Opinion, State J.S. App. A, pp. 25-33.) This issue was expressly not considered by this Court in *St. Martin Evangelical Church, et al. v. South Dakota* (1981) ... U.S. ..., 68 L.Ed.2d 612, 624. The State is in full agreement with the District Court in its granting of declaratory relief on purely statutory construction grounds as to the Category 1 and 2 religious organizations.[10] Rather, the focus of this appeal is on that portion of the judgment which relates to the finding of excessive entanglement with religion in relation to the benefit eligibility determination process. As will be demonstrated below, the evidence produced at trial was far too speculative and does not support such a finding.

II.

The Basis of the District Court's Judgment Was That Both 26 U.S.C. § 3309(b) and California Unemployment Insurance Code § 634.5(a) Were Unconstitutional as Applied. Therefore, Jurisdiction Is Properly Invoked Under 28 U.S.C. § 1252.

On November 2, 1981, the Court agreed to hear the appeals by the State, United States and Grace Brethren appellees but postponed further consideration of jurisdiction

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[10]Likewise, this Court's holding in *St. Martin* is in complete accord with the State's position on the issues considered therein. The State in fact filed an *amicus curiae* brief urging such a holding.

to the hearing of the cases on the merits. As the discussion below will indicate the Court's jurisdiction is properly invoked under 28 U.S.C. § 1252 because the *basis* of the District Court's decision was that *both* an Act of Congress *and* its state analogue were unconstitutional as applied. *United States v. Raines* (1960) 362 U.S. 17, 20.

28 U.S.C. § 1252 is not to be read restrictively. As this Court held in *Reid v. Covert* (1956) 351 U.S. 487, opposite conclusions on merits reached on rehearing (1957) 354 U.S. 1:

> "[I]t would do violence to the purpose of Congress to provide a 'prompt review of the constitutionality of federal acts,' (Citation), to interpret § 1252 restrictively." (*Reid v. Covert, supra,* 351 U.S. 487, 490.)

It is sufficient under 28 U.S.C. § 1252 if the federal statute was held unconstitutional as applied to the circumstances of the particular case. *United States v. Darusmont* (1981) ... U.S. ..., 66 L.Ed.2d 513, 515.

In the instant matter, although the Order and Judgment in the Grace Brethren case speaks in terms of only the California statute being unconstitutional as applied, a review of the District Court's opinion makes it evident that the District Court's conclusion was not so restrictive. (State J.S. App. A, pp. 25-33; App. B, pp. 46-47.)

Specifically, the District Court was well aware of the coordinated nature of the federal-state unemployment compensation tax program. The District Court recognized the "overwhelming pressure" the United States is able to exert over a state such as California to conform its actions to the federal guidelines through the conformity process embodied in 26 U.S.C. § 3304(c). (State J.S. App. A, pp. 36-37;

App. D, pp. 55-57.)[11] This "pressure" exists in benefit eligibility determinations as well in that denial of benefits for employees discharged for misconduct connected with their work is provided both in 26 U.S.C. § 3304(a)(10) and correspondingly in California Unemployment Insurance Code § 1256.

As was indicated in the Statement of Case, the only evidence presented to the District Court on the benefit eligibility issue was the testimony of *federal* witnesses, unfamiliar with California procedures and definitions, applying *federal* guidelines to hypotheticals posed to them by the various parties. No evidence of the specific California application of California Unemployment Insurance Code § 634.5(a) in benefit eligibility hearings was ever presented to the Court.

Although the District Court only referred to the California statute in its Order and Judgment, that conclusion was based upon an analysis of the identical federal statute. (State J.S. App. A, pp. 25-33.)[12] The District Court's language in its Second Supplemental Opinion is particularly helpful in this context:

> "Since such entanglement is inevitable during the benefit eligibility determination process if religious

[11]This Court recognized the "intertwined" nature of the federal-state unemployment compensation law in *St. Martin* at 68 L.Ed.2d 612, 618-619, fn. 9.

[12]*Cf. Williams v. Zbaraz* (1980) 448 U.S. 358, 365-7. In *Williams, unlike the present case*, only the state statute was challenged by the plaintiffs. Nevertheless, the District Court in *Williams* noted that the same reasoning would apply in determining the constitutional validity of both the federal and state statutes. This Court held that the appeal under 28 U.S.C. § 1252 was proper even though the District Court exceeded its jurisdiction in finding the federal statute unconstitutional because no case or controversy was presented and even though all of the relief sought by plaintiffs could have been awarded entirely on the basis of the District Court's ruling on the *state* statute. Unquestionably, in light of *Williams*, the instant appeal is quite properly taken.

> schools are brought within the scope of the *unemployment compensation tax scheme*, constitutional considerations bar the application of the *scheme* to them." (State J.S. App. A, p. 33.) (Emphasis added.)

To further demonstrate that the District Court indeed was holding the federal statute unconstitutional as applied as well, footnote 39 of the Second Supplemental Opinion removes any remaining doubt:

> "At this time, the Court has no information indicating what response, if any, the Secretary will make to the Court's conclusion that the state defendants may not constitutionally impose the state unemployment compensation tax scheme on the Category 3 employees of non-church-affiliated schools. Since such employees were, under any construction of the relevant statutes, subject to the unemployment compensation scheme, the Secretary concentrated his attention on the Category 1 and 2 employees, whose status his erroneous statutory interpretation affected. If the Secretary, in response to failure by the state defendants to collect unemployment compensation taxes on behalf of Category 3 employees, institutes decertification proceedings against the State of California, the parties may apply to this Court for further relief." (State J.S. App. A, p. 44.)

Notwithstanding the fact that the State is the entity in the unemployment compensation tax "scheme" which actually conducts the benefit eligibility hearings, the District Court was well aware that it was not acting independently of the United States. It was the application of *both* the *federal and state* statutes which the District Court found objectionable and upon which its decision was based. Thus, jurisdiction is properly invoked under 28 U.S.C. § 1252.

III.

No Potential for Excessive Entanglement in the Benefit Eligibility Determination Process Has Been Shown.

As has been repeatedly noted herein, the evidence presented at trial regarding entanglements in the benefit eligibility determination process consisted solely of hypothetical questions and the responses thereto by federal witnesses. There was no evidence that any of the situations suggested in the questions have occurred or will ever occur. Such a showing is simply too speculative when balanced against the extreme importance of unemployment benefits for the employees of these religious organizations. This Court has held that a limited judicial review is permissible in church property disputes. The benefit eligibility determination process would easily fall within the confines of said permissible review.

This Court has announced a three-part test for determining whether a statute is permissible under the Establishment Clause of the First Amendment of the United States Constitution. *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612-13. If a statute violates any of the three parts it must be struck down under the Establishment Clause. *Stone v. Graham* (1980) ... U.S. ..., 66 L.Ed.2d 199, 202. The third part of the test is whether the statute fosters an "excessive government entanglement with religion." *Lemon v. Kurtzman, supra*, 403 U.S. 602, 613. This test is inescapably one of degree. *Walz v. Tax Commission* (1970) 397 U.S. 664, 674. Total separation between church and state is not possible nor is it required. Some relationship between government and religious organizations is inevitable. *Lemon v. Kurtzman, supra*, 403 U.S. 602, 614. The Religion Clauses must not be construed with a literalness that would undermine the ultimate constitutional objective as illuminated by history. *Walz v. Tax Commission, supra*, 397 U.S. 664,

671. Of course, the mere potential of *excessive* entanglement is sufficient to offend the First Amendment. *Meek v. Pittenger* (1975) 421 U.S. 349, 371-72; *Lemon v. Kurtzman, supra*, 403 U.S. 602, 615, 619-20; *Catholic Bishop v. NLRB* (7th Cir., 1977) 559 F.2d 1112, 1126, *aff'd.* 440 U.S. 490 (1979). However, the entanglement truly must be *excessive*. The State submits that any entanglement which might occur in the benefit eligibility determination process would be, at most, *de minimis* and thus permissible under the Religion Clauses.

As was carefully and accurately pointed out by the District Court below, the unemployment compensation process involves two separate procedures: (1) a determination as to whether a certain employer is subject to unemployment insurance in the first instance (tax determination) and (2) a determination as to whether a specific employee is eligible for benefits (benefit determination). (State J.S. App. A, pp. 25-26.)

The instant cases originated as a challenge to the imposition of the unemployment insurance tax upon religious schools, *not* as a challenge to an award of benefits to any religious school employee. Since these cases proceeded on the *tax* side of the unemployment compensation process, the record below consists exclusively of declarations, documentation and oral testimony which are related only to the *tax* determination procedure. There was no evidence presented by the appellees that there ever had been a benefit eligibility determination hearing with respect to an employee of a church-related school, much less an actual hearing which necessitated inquiry into church doctrine. The only evidence at trial pertaining to this issue was in the form of hypothetical questions and answers posed to two witnesses for the federal defendants. That which is important though is that although each witness was experienced in the field

of benefit eligibility determination hearings, both witnesses testified that they had *never* conducted, attended nor read a transcript of a benefit eligibility hearing where the issues involved a dispute between a church and church employee with respect to the reasons for the discharge of the employee by the church. (R.T., pp. 165-166; 228-232.)

Unemployment coverage of employees of church-related schools is not a new phenomenon. Parochial elementary and secondary school employees universally were covered under the temporary Special Unemployment Assistant Program ("SUA"; P.L. 93-567, 88 Stat. 1850) from 1974 through 1977, and have since been covered under FUTA in the states which adopted (prior to the *St. Martin* case) the Secretary of Labor's interpretation. Employees of church-related colleges have been covered since 1972. Furthermore, Mr. Carter's testimony indicated that in 1979 alone there were approximately 4 million cases adjudicated nation-wide at the predetermination benefit eligibility hearing stage involving voluntary leave or misconduct issues. (R.T., pp. 191-194.) Yet, there was no evidence that even one of these cases involved a dispute between a religious organization and its employee which necessitated an inquiry into church doctrine or which involved the reasons for the discharge of the employee. Surely, appellees' showing is insufficient to sustain the District Court's conclusion on this issue.

An additional point must be noted that under California law, a determination under the tax side is not necessarily binding on any determination under the benefit side and vice versa. The leading case is *Empire Star Mines, Inc. v. California Employment Commission* (1946) 28 Cal.2d 33, 68 P.2d 686, where the California Supreme Court stated:

> "But there is no basis for the attorney general's contention that because the legislation confers benefits . and also imposes taxes, the two parts of the law are

> inextricably connected. The taxing sections of the legislation are entirely separate from those concerning benefits, and although the benefits are paid from the amount collected as taxes imposed by the act, the provisions fixing liability for payments to the fund are to be considered accordingly." (*Empire Star Mines Co. v. Cal. Emp. Com., supra,* 28 Cal.2d 33, 43.)

The *Empire Star Mines* case dealt with the question of whether or not certain persons who performed services for the Empire Star Mines Company were employees or independent contractors. If these persons were employees, then Empire Star Mines would be subject to the unemployment insurance taxes of California, and its employees would be eligible for unemployment compensation benefits. The language quoted was the court's response to the state's argument that since the individuals who had performed services for Empire Star Mines had already been adjudged to be employees and were awarded unemployment compensation benefits by the California Employment Commission in an administrative proceeding dealing with the benefit issues that had become final, the California Supreme Court was precluded from a finding on the *tax issue* that would be contrary to that administrative result. In California, a determination by the State with regard to benefit eligibility is separate and distinct from a determination by the State with regard to whether or not an employer is subject to the unemployment insurance tax, and each determination may be challenged by the parties in separate proceedings. See California Unemployment Insurance Code §§ 1221 *et seq.* and 1326 *et seq.* It is clear that the California Supreme Court felt that the issue of liability for the unemployment insurance tax could and should be considered independent of any benefit determination involving the employees of the subject employer.

The State is not suggesting that this Court ignore the potential for excessive entanglement in benefit eligibility hearings. Rather, the State submits that this Court should recognize the separateness of the two procedures and in determining the propriety of the exemption from unemployment insurance tax for unaffiliated religious organizations, should require concrete proof of such excessiveness and not rely upon mere hypothetical assertions.

In a benefit eligibility hearing, the purpose is to decide whether a particular employee will receive unemployment benefits. The State is not concerned with the religious beliefs of either the employer or employee. In determining whether an employee was discharged for misconduct the important factor is whether such employee failed to abide by an established work rule. Employers such as the appellees herein are of course free to establish any work rules they desire, including rules incorporating religious beliefs. A knowing violation of a work rule constitutes misconduct. The principal inquiry in a benefit eligibility hearing is not whether a given work rule conforms to Church doctrine but only whether the employee knew of the rule and nevertheless violated it.[13] The benefit eligibility hearing could be con-

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[13]*Maywood Glass Co. v. Stewart* (1959) 170 Cal.App.2d 719, 724, 339 P.2d 611; *Rowe v. Hansen* (1974) 41 Cal.App.3d 512, 521, 116 Cal.Rptr. 16; *Davis v. Unemployment Ins. Appeals Bd.* (1974) 43 Cal.App.3d 71, 75, 117 Cal.Rptr. 463; *Drysdale v. Department of Human Resources Development* (1978) 77 Cal.App.3d 345, 352-3, 142 Cal.Rptr. 495. The test for misconduct is essentially volitional. The focus is on the employee's acts rather than the reasonableness of the work rule or the extent of economic consequences to the employer. Indeed, the mere "flouting" of the employer's authority is sufficient harm to the employer to constitute misconduct if the work rules have been knowingly violated. *Rowe v. Hansen, supra,* 41 Cal.App.3d 512, 523.

The actual reasonableness of a given work rule is rarely the subject of inquiry. However, an employee is not required to comply with a work rule which is considered to be unreasonable in the following *limited* instances as set forth in Title 22 California Administrative Code

(footnote continued on following page)

ducted on a purely *secular* basis. As such the process clearly would not be violative of the First Amendment notwithstanding the religious nature of the employer. *United Methodist Council v. Superior Court* (1978) 439 U.S. 1369, 1371 (Rehnquist, J., in chambers).

This Court has decided a line of cases in recent years relating to church property disputes and the role civil courts may play therein. *Jones v. Wolf* (1979) 443 U.S. 595; *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696; *Maryland & Va. Churches v. Sharpsburg Church* (1970) 396 U.S. 367; *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440. The principles developed therein are helpful and have been held to apply with equal force to church disputes over church polity and church administration. *Serbian Orthodox Diocese v. Milivojevich, supra*, 426 U.S. 696, 710.

From the above cases, it is well settled that the First Amendment prohibits civil courts from resolving church

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Section 1256-36(b)(1) (State J.S. App. K, pp. 97-98):

1. The rule is unreasonable because compliance is impossible due to physical limitations of the employee.
2. The rule is unreasonable because compliance would impose a new and unreasonable burden on the employee.
3. The rule is unreasonable because it does not relate to or affect the employer's business interest.
4. The rule is unreasonable because the employee reasonably believes that compliance would result in a violation of a law.
5. The rule is unreasonable because the employee reasonably believes compliance would cause an undue risk of injury or illness.
6. The rule is unreasonable because the employee had a reasonable doubt of the authority of the individual issuing the order.

The above regulation was promulgated pursuant to California Unemployment Insurance Code §§ 305 *et seq.* in order to enforce the provisions of Section 1256 of the California Unemployment Insurance Code.

It should be noted that the context in which an employee is not required to comply with a work rule under the above regulation is far removed from the situation presented in the instant matter.

disputes on the basis of religious doctrine and practice. *Jones v. Wolf, supra*, 443 U.S. 595, 602; *Serbian Orthodox Diocese v. Milivojevich, supra*, 426 U.S. 696, 710; *Maryland & Va. Churches v. Sharpsburg Church, supra*, 396 U.S. 367, 368; *Presbyterian Church v. Hull Church, supra*, 393 U.S. 440, 449. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. *Jones v. Wolf, supra*, 443 U.S. 595, 602; *Serbian Orthodox Diocese v. Milivojevich, supra*, 426 U.S. 696, 724-5. The First Amendment, however, does not dictate that a state must follow a particular method of resolving church disputes. *Jones v. Wolf, supra*, 443 U.S. 595, 602. Indeed, a state may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters. *Maryland & Va. Churches v. Sharpsburg Church, supra*, 396 U.S. 367, 368 (Brennan, J., concurring). One of the approaches this Court has found to be constitutionally permissible is the neutral-principles approach. *Jones v. Wolf, supra*, 443 U.S. 595, 602-3; *Maryland & Va. Churches v. Sharpsburg Church, supra*, 396 U.S. 367, 368 (Brennan, J., concurring).

In the *Maryland & Va. Churches* case, the Court of Appeals of Maryland was permitted to settle a local church property dispute on the basis of the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property and the provisions of the constitution of the general church concerning the ownership and control of church property. 396 U.S. at 368.

Also, in *Jones v. Wolf, supra*, 443 U.S. 595 this Court reaffirmed the neutral-principles analysis and further indicated that it was constitutionally permissible to require the interested parties to modify the deeds, charters or church

constitution in order to ensure that a certain result would be reached by the civil courts adjudicating the dispute. The burden involved in taking such steps was held to be minimal. *Id.* at 606. Civil courts would be bound to give effect to the result indicated by the parties provided it is embodied in some legally cognizable form. *Ibid.*

Similarly, in a benefit eligibility hearing it would not be an unconstitutional burden to require the interested parties to prove what the work rule in question was. Under California law, the *employer* would have the burden of proving what the work rule was and that the employee knowingly violated it. *Maywood Glass Co. v. Stewart, supra*, 170 Cal.App.2d 719, 724-5; California Unemployment Insurance Code § 1256.

Once the religious employer demonstrated what was the work rule or church doctrine alleged to have been violated, the State would be bound to give effect to that work rule or church doctrine. *Jones v. Wolf, supra*, 443 U.S. 595, 606.

In determining whether there was a "knowing violation" of the work rule (or church doctrine as the case may be), the State would *not* be foreclosed from determining the *existence* of the individual's religious belief or understanding of the church doctrine. The State would be foreclosed from determining the *truth* of that belief or understanding. *United States v. Seeger* (1968) 380 U.S. 163, 185.

The distinction between adjudicating the employee's *understanding* of church doctrine versus the doctrine itself is crucial. Only the former would need to be adjudicated in a benefit eligibility hearing. This adjudication would be plainly permissible under this Court's recent holding in *Thomas v. Review Bd. of Indiana Employment Sec.* (1981) ... U.S. ..., 101 S.Ct. 1425, 1430-1431. Under *Thomas*,

the State would be allowed to determine whether the employee had terminated his or her employment because of an *honest conviction* that such work was forbidden by his religion. *Id.* at 1431. However, it would not be within the competence of the State or the judiciary to inquire whether the employee or someone else more correctly perceived the commands of their common faith. *Ibid.* The State would not be permitted to become an "arbiter of scriptural interpretation." *Ibid.* Nonetheless, *Thomas* indicates that without violating the Religion Clauses, the State could adjudicate the employee's *understanding* of the work rule or church doctrine.

Furthermore, it has been held that the Religion Clauses do not prevent a civil court from independently examining and making the ultimate decision regarding the structure and actual operation of a hierarchical church and its constituent units. *United Methodist Council v. Superior Court, supra,* 439 U.S. 1369, 1372 (Rehnquist, J., in chambers). In *United Methodist,* Justice Rehnquist continued stating:

> "There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intra-church disputes. See *Serbian Eastern Orthodox Diocese v. Milivojevich.* But this Court never has suggested that those constraints similarly apply outside the context of such intra-organization disputes. Thus, *Serbian Eastern Orthodox Diocese* and other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intra-church disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. 426 U.S. at 709-710. *Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious af-*

filiated organization, in which fraud, breach of contract, and statutory violations are alleged." *Id.* at 1372-3. (Emphasis added.)

The benefit eligibility hearing could conceivably be analogized to a breach of contract adjudication in that the employer is in essence alleging that the employee knowingly violated his or her "contract of employment." The proceeding would be purely *secular* with no necessity to interpret or weigh church doctrine. *Cf. Presbyterian Church v. Hull Church, supra,* 393 U.S. 440, 450. The only issue to be resolved would be whether the employee failed to abide by an established work rule. The potential for any impermissible or excessive entanglement between church and state is genuinely lacking.

Finally, this Court has recognized an exception to the rule that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity in their application to the religious issues of doctrine or polity before them. *Jones v. Wolf, supra,* 443 U.S. 595, 609, fn.8; see also *United Methodist Council v. Superior Court, supra,* 439 U.S. 1369. If the decision of the religious tribunal was the product of fraud or collusion "marginal civil court review" of that decision would be permissible. *United Methodist Council v. Superior Court, supra,* 439 U.S. 1369; *Serbian Orthodox Diocese v. Milivojevich, supra,* 426 U.S. 696, 713. In fact, this Court has seemingly left open the question whether in addition to the above instances when a church tribunal "act(s) in bad faith for secular purposes", a limited exception may exist for an arbitrary decision by the church tribunal. See *Serbian Orthodox Diocese v. Milivojevich, supra,* 426 U.S. 696, 713.

The State is not suggesting that the decision of a religious employer to terminate an employee would be the product of fraud, collusion or arbitrariness. Nonetheless, that which

is important is that this Court has permitted in those instances a "marginal civil court review" of decisions of church tribunals on matters which are *purely ecclesiastical*. In a benefit eligibility hearing, there would *never* be a necessity to review the religious employer's interpretation of its doctrine or work rules. Unquestionably, under the requisite close scrutiny of the *degree* of entanglement involved in the relationship, there would be absolutely no potential for excessive governmental entanglement with religion. See *Lemon v. Kurtzman, supra*, 403 U.S. 602, 614.

IV.

No Violation of the Free Exercise Clause Results From the Inclusion of Employees of Religious Schools in the Unemployment Compensation Tax Program.

Appellees contend that the District Court erred in finding that the inclusion of employees of religious schools in the unemployment compensation tax program results in no violation of the Free Exercise Clause. The State respectfully disagrees with the appellees. The law and the facts of this case plainly support the District Court's findings. The arguments put forth herein by the appellees were fully considered and properly rejected by the District Court. (State J.S. App. A, pp. 16-25.)

In considering appellees' arguments below, the District Court correctly observed that the injury to the Free Exercise rights asserted by the appellees ultimately comes down to the *financial* burden imposed by the extension of the unemployment compensation tax to these schools. (*See*, State J.S. App. A, pp. 20-21, 25-26.) Indeed, the Grace Brethren appellees' chief witness, Mr. Enderlin, the superintendent of Redwood Christian Schools testified below that a very important reason his school is opposed to the imposition of the unemployment compensation tax is the *financial* aspect

of the program. (R.T., pp. 43-45.) Consistent therewith, the superintendent also testified that with respect to minimum wage and worker's compensation laws his school would *not* comply with those laws if the *cost of compliance* rose to a point *above* that which would be acceptable to the school. (R.T., pp. 40-42; 70-73.) Mr. Enderlin also indicated that his schools complied with fire, safety, sanitation and health regulations imposed by governmental bodies because they help to advance the schools' religious mission *and because there had not yet been any unreasonable demands*. (R.T., pp. 30-31.)

Further, the testimony of another appellee, Mrs. Brandwood, a parent of students attending Redwood Christian Schools, indicated that her opposition to the imposition of the unemployment compensation tax was *financially* related in that her tuition would have to increase in the event the program was extended to cover Redwood. (R.T., p. 115.)

In all, the evidence presented below plainly demonstrated that the burden or injury complained of by the appellees was purely financial in nature.[14] As the District Court correctly noted "there [was] no suggestion that the extension of the tax to religious schools would abridge rights to the free exercise of religion in any fashion *independent* of the financial burden which accompanies any tax." (State J.S.

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[14]The District Court correctly pointed out (State J.S. App. A, pp. 22-23) that the "burden" the unemployment compensation tax imposes upon a non-profit employer such as appellees is *indirect* in that the employer may elect the "reimbursement method" of contribution and thus contribute only the amounts of benefits actually found due to its former employees who have been or are discharged. *See*, 26 U.S.C. §§ 3303(e), 3309(a)(2) and California Unemployment Insurance Code §§ 801 *et seq*. In the alternative, the employer may choose the "tax rate" method and contribute according to the number of employees and his past employment history. *See*, 26 U.S.C. § 3302(a)(1) and California Unemployment Insurance Code §§ 901 *et seq*. and 976 *et seq*. Clearly, the opportunity to select either method of contribution minimizes the financial impact upon the employer.

App. A, p. 20.) This Court has noted previously that the mere fact that a statute renders the practice of religion more expensive is not, by itself, sufficient to bring the statute into conflict with the Free Exercise Clause. *Braunfeld v. Brown* (1961) 366 U.S. 599, 605; *Johnson v. Robison* (1974) 415 U.S. 361, 383-5 (argument rejected that the withholding of educational benefits from a conscientious objector violated the free exercise rights of the objector). There is no constitutional right to exemption from taxes for the appellees. *Follett v. McCormick* (1944) 321 U.S. 573, 578; *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 112.

Moreover, it is without dispute that religiously based activities "are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers." *Wisconsin v. Yoder* (1972) 406 U.S. 205, 220. *See, Gillette v. United States* (1971) 401 U.S. 437 (conscientious objector exemption statute upheld); *Braunfeld v. Brown, supra,* 366 U.S. 599 (mandatory Sunday closing law applicable to Orthodox Jewish merchants); *Prince v. Massachusetts* (1944) 321 U.S. 158 (child labor law applicable to religious organizations); *Reynolds v. United States* (1879) 98 U.S. 145 (polygamy statutes applicable to religious organizations which sanctioned such activities).

Neutral legislation which is far more burdensome upon the practice of religion than that which is present in the instant case has been upheld by this Court where important public policies are at stake. *Committee For Public Education And Religious Liberty v. Regan* (1980) 444 U.S. 646, 659-661; *Prince v. Massachusetts, supra,* 321 U.S. 158.

Furthermore, appellees' argument that excessive entanglement results from the routine duty under the unemployment compensation tax program to keep accurate employ-

ment records and make related reports to the State must be rejected in that the recordkeeping involved herein is far less extensive than that which was recently sustained against similar charges in *Committee For Public Education And Religious Liberty v. Regan, supra,* 444 U.S. 646, 659-661. *See also, United States v. Holmes* (5th Cir., 1980) 614 F.2d 985 (Internal Revenue Service summons enforced as to a bishop and director of a church as against a First Amendment challenge. The Court balanced the incidental burden on the church against the interest of government in its fiscal integrity).

Finally, the District Court correctly pointed out that there is indeed a compelling secular governmental interest in providing unemployment compensation to unemployed individuals. (State J.S. App. A, pp. 24-25.) *See*, California Unemployment Insurance Code § 100, which lists the secular purposes for which California adopted its own unemployment compensation program. Further, this Court has recognized the extreme importance of unemployment benefits. *California Department of Human Resources v. Java* (1971) 402 U.S. 121, 131-2 ("Unemployment benefits provide cash to a newly unemployed worker, 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels . . ."). When this compelling interest is balanced against the indirect, purely financial burden which the unemployment compensation tax program imposes upon the appellees, the conclusion is inescapable that no violation of the Free Exercise Clause results from the inclusion of the employees of religious schools in the unemployment compensation tax program.

V.

No Violation of the Equal Protection Clause Results From the Inclusion of Employees of Unaffiliated Religiously Oriented Schools in the Unemployment Compensation Tax Program.

Although the District Court did not reach the question whether to deny the exemption provided in 26 U.S.C. § 3309(b) and California Unemployment Insurance Code § 634.5(a) to the Category 3 religious organizations because of their lack of formal church affiliation would be a denial of equal protection, the Court did consider and discuss the issue. In its Second Supplemental Opinion, the District Court suggested that a constitutionally permissible classification of employers could be by religious mission and curriculum content rather than by formal church affiliation.[15] (State J.S. App. A, p. 35.) The State submits that to heed the District Court's suggestion would unquestionably lead to more entanglement between church and state in that it would be virtually impossible for the state to make the determination of the existence of a sufficiently religious mission or curriculum without the constant monitoring abhorred by this Court in *Lemon v. Kurtzman, supra*, 403 U.S. 602, 627 (Douglas, J., concurring).[16]

It is beyond dispute that a tax exemption is a matter of legislative grace and the taxpayer has the burden of es-

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[15]The classification of employers for purposes of FUTA has long been held to be constitutionally permissible. *Carmichael v. Southern Coal & Coke Co.* (1937) 301 U.S. 495, 508-512.

[16]*Cf. Thomas v. Review Bd. of Indiana Employment Sec., supra*, ... U.S. ..., 101 S.Ct. 1425, 1432, where this Court rejected the argument put forth in support of the Indiana benefit eligibility procedures, that the procedures would avoid detailed probing by *employers* in job applicants' religious beliefs. Unlike *Thomas*, the "probing" which would result in extending the exemption as suggested by the District Court, would be by the *government* and thus be much more *direct*.

tablishing its entitlement to the exemption. *Dickinson v. United States* (1953) 346 U.S. 389, 394-5. As the Eighth Circuit of the United States Court of Appeals has indicated, the receiving of an exemption is *not* a constitutional right for a religious organization. *Parker v. Commissioner of Internal Revenue* (8th Cir., 1966) 365 F.2d 792, 795, *cert. den.* 385 U.S. 1026. Specifically, the Court stated:

> "Since the government may constitutionally tax the income of religious organizations, it follows that the government may decide not to exercise this power and grant reasonable exemptions to qualifying organizations, while continuing to tax those who fail to meet these qualifications. The receiving of an exemption is thus a matter of legislative grace and not a constitutional right. As long as exemptions are denied by the Commissioner on a non-discriminatory basis using specific and reasonable guidelines and *without inquiry into the merits of the particular religious doctrines*, the withholding of religious exemptions is permissible under the Constitution." (Emphasis added.) (Footnote omitted.) (*Id.* at 795.)

Obviously, the Classification of employers according to church affiliation rather than on some other basis satisfies the Eighth Circuit's criteria and avoids the "inquiry into the merits of the particular religious doctrines."

An analogous situation exists under 26 U.S.C. § 1402(g) which provides an exemption from social security taxes for a "recognized religious sect" which by reason of the tenets of the sect is opposed to the receipt of social security benefits and agrees to waive them. Further, the Secretary of Health, Education and Welfare must find that the sect makes reasonable provision for its dependent members. This Court expressed no objection to this exemption statute in *Wisconsin v. Yoder, supra*, 406 U.S. 205, 222-3, fn. 11.

In *Jaggard v. Commissioner of Internal Revenue* (8th Cir., 1978) 582 F.2d 1189, *cert. den.* 440 U.S. 913, the Eighth Circuit discussed the purpose of 26 U.S.C. § 1402(g) and rejected an argument by the taxpayer that the requirement of a "recognized religious sect" was unconstitutional and that the exemption should be available to all individuals who meet the other criteria under the statute. The Eighth Circuit stated:

> "Jaggard's argument has been previously considered and rejected by the Tax Court. *Henson v. Commissioner*, 66 T.C. 835, 840 (1976); *Palmer v. Commissioner*, 52 T.C. 310, 314-15 (1969). These cases hold that the purpose of § 1402(g) is neither the advancement nor the inhibition of religion. It represents a congressional attempt to accommodate sincerely held religious beliefs against private and public insurance programs consistent with the overall welfare purpose of the Social Security Act. Congress could reasonably conclude that individuals on their own could not be relied upon to provide for themselves in the event of dependency, but that members of a religious sect who share these views would provide for dependent members. Although in any legislative accommodation of religion there is an inherent balancing of interest, the balance struck here was a constitutionally permissible one. We find the reasoning of these opinions to be dispositive of the issue. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 222 & n. 11, 92 S.Ct. 1526, 32 L.Ed.2d 25 (1972)." (*Id.* at 1190.)

A similar accommodation of religion was attempted by Congress when it amended FUTA in 1970 to include state law coverage of non-profit organizations. The Senate Report is clear on that point. It provides:

> "Present law. — Under existing Federal law, services performed for non-profit religious, charitable,

> educational and humane organizations and for a State and its political subdivisions are exempt from the tax provisions of the Federal Unemployment Tax Act. There has not, therefore, been a tax-credit incentive for covering employees of these organizations and governments for unemployment compensation purposes. While employment in these organizations and governments is not subject to fluctuations to the same degree as in commerce and industry, unemployment affects a substantial number of their employees, particularly people working in non-professional occupations.
>
> The committee does not want to change the present tax status of non-profit organizations, but is concerned about the need of their employees for protection against wage loss resulting from unemployment . . . Under the reimbursement method of financing, a non-profit organization whose workers experience no compensated unemployment in a year would have no unemployment insurance costs for that year. The committee considers it appropriate that these organizations, which are often dependent upon charitable contributions, should not be required to share in the costs of providing benefits to workers in profit-making enterprises." (S.Rep. No. 91-752, 91st Cong. 2d Sess. 14, reprinted in (1970) U.S. Code Cong. & Ad. News 3606, 3617-18.)

Congress respected the needs of the non-profit organizations but also recognized the tremendous needs of the employees of such organizations for protection against wage loss. Any attempt to remove this protection must be closely scrutinized especially in this period of high unemployment.

The classification of employers provided in 26 U.S.C. § 3309(b) and California Unemployment Insurance Code § 634.5(a) strikes a reasonable balance between sincerely held religious beliefs and protection for employees against

unexpected wage loss. Moreover, it avoids any excessive governmental entanglement with religious entities. As such, there is no denial of equal protection.

VI.

28 U.S.C. § 1341 Should Not Bar This Action.

The United States raised the argument that 28 U.S.C. § 1341 deprived the District Court of subject matter jurisdiction of these cases. The State submits that the United States is in error and that this Court should reach the merits of this controversy.

The basis for the State's argument is that the United States was clearly an indispensable party to these actions in that without its joinder appellees could not have obtained complete relief because of the conformity procedures existing in FUTA. Therefore, as the United States cannot be compelled to submit to state court jurisdiction, the state remedy for appellees was not plain, speedy and efficient for purposes of 28 U.S.C. § 1341.[17] Consequently, there is no jurisdictional bar for this Court to overcome to reach the merits herein.

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[17]It should be noted in this regard that the United States in fact removed the Lutheran case from state court to federal court.

CONCLUSION.

For the foregoing reasons, the State respectfully urges the Court to reverse the judgment of the District Court insofar as it is challenged by the State's appeal.

Respectfully submitted,

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Nos. 81-31, 81-228 and 81-455

IN THE

Supreme Court of the United States

October Term, 1981

CALIFORNIA, et al., Appellants in No. 81-31

v.

GRACE BRETHREN CHURCH, et al.

UNITED STATES, et al., Appellants in No. 81-228

v.

GRACE BRETHREN CHURCH, et al.

GRACE BRETHREN CHURCH, et al., Cross-Appellants in No. 81-455

v.

UNITED STATES, et al.

On Appeals From the United States District Court for the Central District of California

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QUESTIONS PRESENTED

1. Does the imposition, upon pervasively religious schools, of the federal-state unemployment tax program violate the non-entanglement limitations of the Establishment Clause of the First Amendment?

2. Does the Tax Injunction Act bar a district court from exercising jurisdiction in respect to a complaint which makes substantial claims under the Religion Clauses of the First Amendment challenging the imposition of a state tax, where a state's constitution and statutes prohibit initial resort to the state's courts but instead require the claimant to pursue protracted administrative proceedings in which constitutional issues are barred from consideration and which involve excessive entanglement of government with religion?

3. Does such imposition violate rights, protected by the Free Exercise Clause, of those schools, of teachers pursuing a religious vocation in such schools, and of parents whose children are enrolled therein?

4. Does imposition of the federal-state unemployment tax program upon pervasively religious schools which, though not operated by churches, are indistinguishable from them in religious character and mission, violate rights guaranteed such schools by the Equal Protection Clause of the Fourteenth Amendment?

PARTIES

The parties in the court below were:

PLAINTIFFS

"Grace Brethren" case (No. CV 79-93 MRP):

Grace Brethren Church of Long Beach, California, and its pastor, Rev. David L. Hocking;

Calvary Cross Church of the Highlands of San Bruno, California, and its pastor, Rev. Donald B. Sheeley;

Scott Memorial Baptist Church of San Diego, California, and its pastor, Rev. Tim LaHaye;

Christian Unified Schools of San Diego, an incorporated association of five fundamentalist schools with a central office in El Cajon, California;

Redwood Christian Schools, an incorporated association of four fundamentalist schools with a central office in Castro Valley, California;

Sidney and Patricia Bowen of Compton, California, whose children attend Grace Christian Schools, an affiliate of plaintiff Grace Brethren Church;

Peter and Sue Farrelly of Pacifica, California, whose children attend Highlands Academy, an affiliate of plaintiff Calvary Cross Church of the Highlands;

William and Janet Tschantz of La Mesa, California, whose children attend plaintiff Christian Unified Schools of San Diego;

Arthur and Cheryl Brandwood of Hayward, California, whose children attend plaintiff Redwood Christian Schools;

Stanley Eddington of San Lorenzo, California, a teacher at plaintiff Redwood Christian Schools;

R. Florence Murti of Daly City, California, a teacher at Highlands Academy; and

R. Suzanne Royer of Long Beach, California, a teacher at Grace Christian Schools.

"Lutheran" case (No. CV 79-162 MRP):

The Lutheran Church-Missouri Synod;
St. John's Lutheran Church, a member of Lutheran Church-Missouri Synod and operator of a primary school at Orange, California;
Vivadell Keiser, a teacher at the school operated by St. John's Lutheran Church.

DEFENDANTS

"Grace Brethren" case (No. CV 79-93 MRP):

The State of California;
The California Employment Development Department;
The Director of the California Employment Development Department;
The United States of America;
The United States Department of Labor; and
The United States Secretary of Labor.

"Lutheran" case (No. CV 79-162 MRP):

The California Employment Development Department;
The Director of the California Employment Development Department;
The United States Secretary of Labor.

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Appellants

v.

GRACE BRETHREN CHURCH, ET AL.

No. 81-455

GRACE BRETHREN CHURCH, ET AL.,

Cross-Appellants

v.

UNITED STATES, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR GRACE BRETHREN CHURCH, ET AL.

OPINIONS BELOW

The opinion of the district court filed September 21, 1979 (J. S. App. 1a-22a)[1] is unreported. The first supplemental opinion filed June 2, 1980 (J. S. App. 25a-34a), and the second supplemental opinion filed April 3, 1981 (J. S. App. 38a-86a), are likewise unreported.

JURISDICTION

The judgment of the district court was entered on April 6, 1981 (J. S. App. 87a-90a). The federal parties filed notice of appeal to this Court on April 29, 1981 (J. S. 91a-92a). Justice Rehnquist extended until August 3, 1981, the time in which to docket the appeal (J. S. App. 93a). The federal parties invoked the Court's jurisdiction under 28 U. S. C. § 1252. The state parties filed notice of appeal to this Court on May 6, 1981 (State J. S. App. H, pp. 84-87; App. I, pp. 88-91). Grace Brethren Church, *et al.*, filed a cross-jurisdictional statement on September 1, 1981, under the second paragraph of 28 U. S. C. § 1252, having received notice of appeal by the federal parties that the latter had invoked the jurisdiction of this Court herein under that section. The church appeal was docketed on that date.

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1. Unless otherwise indicated, references to "J. S." and "J. S. App." are to the United States' Jurisdictional Statement and Appendix filed in No. 81-228.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

U. S. Constitution, Amendment XIV, Sec. 1:

> * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

26 U. S. C. § 3309(b) (Federal Unemployment Tax Act):

> This section shall not apply to service performed—
>
> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

Cal. Unemp. Ins. Code § 634.5 (West Supp. 1981):

> With respect to * * * any nonprofit organization described by Section 608, "employment" does not include * * * service performed in any of the following:
>
> (a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

28 U. S. C. § 1252:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or

> order of any court of the United States, * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

28 U. S. C. § 1341 (Tax Injunction Act):

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

COUNTERSTATEMENT OF THE CASE

On January 8, 1979, Grace Brethren Church, along with other churches and their pastors, two groups of religious schools, parents of children attending these, and teachers in the schools, brought this action in the district court against the United States and the State of California.[2] Among the school plaintiffs were pervasively religious schools (Redwood Christian Schools) which are operated exclusively for religious purposes but are not operated, supervised, controlled, or primarily supported by, a church or convention or association of churches. The complaint, alleging lack of statutory authority and Religion Clause violation, challenged the imposition, upon the church-schools and the Redwood Christian Schools, of the Federal Unemployment Tax Act ("FUTA"), 26 U. S. C. § 3301 *et seq.*, and the corresponding California Unemployment Insurance Code. Both declaratory and injunctive relief were sought.

The federal defendants moved to dismiss the complaint on the ground that the district court, by virtue of the Tax Injunction Act, 28 U. S. C. § 1341, lacked subject matter jurisdiction. The district court, on September 21, 1979, held that employees of schools operated by churches or by churches through separate corporations were not covered, according to the plain meaning of the statutes. The court also held that it had subject matter jurisdiction, the Tax Injunction Act being inapplicable in the premises due to lack of an efficient remedy under California law, in that

2. A second litigation, *The Lutheran Church-Missouri Synod, et al. v. State of California Employment Development Department, et al.*, challenging, on statutory and constitutional grounds, application of the California Unemployment Insurance Code to schools operated by members of the Missouri Synod, had been consolidated for trial with the *Grace Brethren* action. The Lutheran schools in question were either without a separate legal existence from the churches by which they were operated or were operated as a separate corporation of a church or association of churches.

First Amendment rights would be violated by the state tax determination process (J. S. App. 16a-21a).

A trial ensued at which were heard numerous witnesses for the plaintiffs and witnesses for the United States.

Upon trial the defendant United States Department of Labor presented, as expert witnesses, two employees of the Department who testified at length with respect to the benefit determination process. (J. A. 103-188).[3] The witness Ernest L. Carter identified himself as "an unemployment insurance program specialist" who furnishes "technical assistance to the states interpreting federal law, federal requirements in unemployment insurance." (J. A. 104). The witness stated that he was involved in "determination of eligibility under state law regarding discharge [and] refusals of employment." (J. A. 104). Testifying that the unemployment insurance program is a "federal-state program", he stated that it was the job of his office "to ensure that the state agencies comply with the federal standards" with respect to benefit determinations. (J. A. 108). Counsel for the federal government questioned the witness as to how determinations are made where the employee of a religious school is discharged on religious or moral grounds. The federal government's second witness, Bernard Streett, Supervisor of the Appeals Unit for the Unemployment Insurance Service, Employment and Training Administration, U. S. Department of Labor, testified "as an expert on the issue of the federal standards for adjudication of claims in formal hearings before state unemployment insurance agencies." (J. A. 152). He stated that it is the function of his office "to monitor the nature of the hearing processes that take place in the states and how those processes function." (J. A. 151). His testimony then dealt extensively with the application of federal guidelines to cases (in the states) involving benefit determinations where employees of religious schools are discharged on religious or moral

3. "J. A." indicates reference to the Joint Appendix herein.

grounds. (J. A. 155-188). The State of California did not object to the questions propounded to these witnesses; nor did California offer any witnesses in order to present testimony to show that the benefit determination processes in California differ significantly from those contained in the federal guidelines, in particular in respect to cases involving employees discharged from religious schools.

The testimony of the government witnesses disclosed that:

(a) The state claims determination agency entertains and passes upon conflicting claims as to whether the employee of a religious body was discharged because of violation of that body's articles of faith. (J. A. 119-121, 134).

(b) The religious body which is the employer is made to bear the burden of proof that (a) the particular doctrine was part of an agreement between itself and the discharged employee and (b) that the employee breached that agreement. (J. A. 121).

(c) Where the religious body discharges the employee due to its judgment that the employee has shown a decline in religious fervor, the state agent must declare this not to be misconduct unless it has caused harm to the religious body, and the state is the judge of whether "harm" has in fact taken place. (J. A. 123-124).

(d) The agent of the state must become familiar with religious doctrine (J. A. 132) in order to be able to determine not merely whether there has occurred a violation of an express rule of the religious body, but also to determine the issue of whether there has occurred a violation of an implied rule of that body. (*Ibid.*)

(e) Within the state's jurisdiction to determine religious reasons for discharge is also jurisdiction to weigh and determine moral reasons for discharge. (J. A. 134).

(f) Whether or not an employee of a religious body, who was discharged on account of incompetence, was incompetent to communicate the doctrine of the religious body is a matter to be determined by the state (J. A. 135-136), and if this incompetence was not willful, it would not be construed as misconduct. (J. A. 136).

(g) The state determines whether the religious body need have given express warning to its employee, and whether that warning was reasonable or needed. (J. A. 139-140).

(h) The state determines whether a particular rule of the religious body is an important one. (J. A. 140-141).

(i) The state makes "a determination of the effect [of the employee's conduct] on the religion or the church". (J. A. 142).

(j) The state may determine whether a religious body is a church (J. A. 166-167), and whether a particular employee of that body is a minister. (J. A. 177).

(k) Where a religious body and its discharged employee dispute the reasonableness of the rule of the religious body which that body claims the employee violated, the state will determine the issue of reasonableness. (J. A. 167-169).

(l) In the case wherein there appears to have been a misunderstanding over whether a doctrinal point had been agreed upon by the religious body and its employee, the state must find in favor of the employee. (J. A. 170).

(m) Where the religious body and its employee disagree upon a point of doctrine, "that situation would lend itself to a decision in favor of the employee". (J. A. 173).

On April 6, 1981, the district court issued a permanent injunction enjoining the imposition of the Act. The court held that the imposition of the program on the church-schools (whether incorporated separately from a church or not) (a) is barred by the plain meaning of the federal act which exempts church employees, and (b) creates excessive church-state entanglements forbidden by the Establishment Clause due to "[i]nvolvement of state officials in the resolution of questions of religious doctrine in the course of determining the benefit eligibility of discharged employees of religious schools." (J. S. App. 88a). The court also held that the application of the Act to the non-church religious schools (Redwood Christian Schools) would be "incompatible with the Religion Clauses of the First Amendment because it results in excessive entanglement of the state with religion." (J. S. App. 89a). The court also held that no violation of the Free Exercise Clause arose as to any of the schools (J. S. App. 58a-66a).

The federal parties filed notice of appeal to the Supreme Court on April 29, 1981; the state parties field notice of appeal on May 6, 1981. Grace Brethren Church, *et al.*, filed a cross-jurisdictional statement on September 1, 1981.[4] This Court on November 2, 1981, postponed further consideration of its jurisdiction to the hearing of the cases (consolidated) on the merits.

4. Neither governmental party challenges the conclusion of the district court that separately incorporated church-schools are exempt under the statutory scheme. This case therefore pertains solely to non-church religious schools.

SUMMARY OF ARGUMENT

This case concerns the imposition of the federal-state unemployment tax program upon pervasively religious schools which, though not church-affiliated, are indistinguishable in religious mission from schools which are.

The district court was correct in holding that the imposition of the program upon non-church religious educational ministries violates the non-entanglement requirements of the Establishment Clause. Extensive evidence adduced upon trial shows that the benefit eligibility determination process readily involves the state in the resolution of religious issues where employees of religious institutions are discharged for "misconduct" or terminate employment for "good cause". Further, the application of the California Unemployment Insurance Code itself to religious schools involves sustained and detailed relationships between government and religious bodies of a kind condemned by this Court as excessively entangling.

The Tax Injunction Act did not deprive the district court of subject matter jurisdiction, the California Constitution and the California Unemployment Insurance Code operating to render unavailable to the schools any "plain, speedy and efficient" remedy in the courts of the state. Further, a religious body, if left to its remedies under California law, would be forced to suffer substantial constitutional damage.

Imposition of the program would violate free exercise rights of the religious ministries in question by imposing a tax directly on religious activity which burdens that activity. The program lends itself to governmental conditioning of the employment relationship within religious institutions, and burdens teachers in the schools, and parents of children enrolled therein, in the exercise of religious liberties. No compelling governmental interest has been shown to justify the imposing of these burdens upon religious freedom.

To impose the program upon the non-church-affiliated religious schools here involved, while exempting church-affiliated schools, would constitute arbitrary discrimination against the former, violative of the requirements of equal protection.

ARGUMENT

I. Imposition of the Federal-State Unemployment Tax Program on Pervasively Religious Schools Violates the Non-Entanglement Limitations of the Establishment Clause.

The district court, based on the evidence presented, found:

> "The church-affiliated and non-church-affiliated schools in the two cases are virtually indistinguishable in religious mission. The overriding purpose of all the schools is to instill religious values and beliefs in young people. In each school, an attempt is made to create an environment in which religion is pervasive. An effort is made to teach all subjects, including those traditionally regarded as secular, from a religious perspective, and religion permeates extracurricular activities as well." (J. S. App. 75a).

The court held, therefore, that the non-church religious schools are entitled to the same First Amendment protection against imposition of the Unemployment Tax Act as the church-schools. The conclusion of the court is patently correct.

The governmental parties principally contend that the district court erred in its holding that the imposition of the unemployment compensation tax scheme upon the non-church schools would violate the Establishment Clause. In two respects that contention is incorrect. First, the benefit eligibility determination process gives rise to excessive entanglement between government and religious ministries. Second, the administrative processes required by the California Unemployment Insurance Code, if applied to such ministries, would constitute sustained and detailed administrative relationships similarly offensive to Establishment Clause principle.

A. Entanglement in the Benefit Eligibility Determination Process

Under § 3304(a)(10) of the Federal Unemployment Tax Act and § 1256 of the California Unemployment Insurance Code, an employee subject to the unemployment compensation scheme is disqualified from receiving benefits to which he would be otherwise entitled if he is discharged for "misconduct". § 1256 of the California Unemployment Insurance Code also disqualifies those employees who leave work "voluntarily without good cause". Determination of whether a discharge is for misconduct, or whether a voluntary termination is for "good cause", is a function of the state officer who administers the unemployment compensation program. The district court correctly held that, in the benefit determination proceedings, state officers "would be called upon to resolve questions of religious doctrine . . . , thus entangling the state with religion in a constitutionally impermissible manner." (J. S. App. 68a).

A critically important group of employees in the religious schools is its teachers. This Court, in *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 502 (1979) addressed the matter of government inquiry into teacher dismissals in such schools as follows:

> "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the *very process of inquiry* leading to findings and conclusions." (Emphasis supplied).

This entangling and chilling process results from involvement of government in a "church-teacher relationship in a church-operated school [which] differs from the employment relationship in a public or other non-religious school." *Id.* at 504.

Teachers play a "key role", *Catholic Bishop, supra*, at 501, in the mission of the religious school. That mission, in respect to the Redwood Christian schools, embraces at least

the following areas: curriculum (J. A. 85, 87, 88); pervasiveness of Bible-centered religion in the life of the school (J. A. 85, 87); textbooks (T. 24-27, 28, 29);[5] discipline (J. A. 85-87); dress (J. A. 87); moral conduct of faculty and students (J. A. 93, 96); religious character and religious witness of teachers (J. A. 89-91); religious atmosphere (J. A. 86); the faculty as a community of faith (J. A. 92); control of teaching and school life from point of view of faith and morals (J. A. 93); religious holidays and character of religious observances (J. A. 85-86). Employees other than teachers are also fully a part of the schools' religious ministry. (J. A. 89).

With respect to each of these sensitive areas, it is possible that cause may arise which will warrant dismissal, on religious grounds, of an employee, or will give rise to a dispute which an employee may claim is "good cause" for leaving. In either event, following a claim for unemployment compensation, the secular authority (in the form of the hearing examiner) would be called upon to rule upon whether the voluntary termination was for good cause, or upon whether the conduct of the employee constituted misconduct. As has been seen (see Counterstatement of the Case, *supra* at 7-8), this determination readily involves the state in the determination of religious issues.[6]

The post-termination processes are, of course, a necessary working part of the unemployment compensation program. If there is no allowance to the employer for misconduct situations, then every discharge is compensable. If such allowance is made, then the state *is* obligated to

5. "T." indicates reference to the Transcript of Proceedings before the Hon. Mariana R. Pfaelzer on August 12-13, 1980.

6. Although these pervasively religious schools maintain a conscientious opposition to the practice of abortion and extra-marital sex, the Federal Unemployment Tax Act forbids a state to deny an award of benefits "on the basis of pregnancy or termination of pregnancy". 26 U. S. C. § 3304(a)(12). Thus a school employee dismissed for pregnancy out of wedlock or for procuring an abortion would be paid benefits at the expense of the school.

determine the existence, or not, of misconduct. But in the application of the Act to religious organisms, the terms "misconduct" and "good cause" are necessarily weighted with a range of religious and moral matters, and if anything is clear under the Constitution, it is that government may have "*no role*" in passing upon such matters.

Also, however, is the potential effect upon *present* employees of the exercise by government of that forbidden role. In *Catholic Bishop of Chicago, supra*, this Court pointed to the effect of the very presence of NLRB jurisdiction over the religious schools there considered:

> " 'The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools'." *Id.* at 496.

The governmental parties are tardy in attempting to improve, from their point of view, the trial record. The unemployment compensation program is a federally controlled program.[7] Upon the trial the federal government presented expert testimony to show how the Department of Labor considers the benefit determination process to work in all fifty states and how the Department furnishes training to state unemployment compensation officers in the requirements of federal law—and in particular with respect to the benefit determination process. (J. A. 103-188).

The State did not object to the introduction of this testimony. With full opportunity to do so, it presented no evidence whatever to show that California conducts

7. The United States Secretary of Labor is required to approve the law of any state participating in it, 26 U. S. C. § 3304(a), and each year he must certify to the Secretary of the Treasury each state whose law he has previously approved, 26 U. S. C. § 3304(c), and can decertify any state which has failed to comply with certification requirements. 26 U. S. C. § 3304(c), (d). Credit against the federal tax imposed by the Federal Unemployment Tax Act, for contributions made to state unemployment compensation funds, is dependent upon the aforementioned federal certification. 26 U. S. C. § 3302(a).

the benefit determination process outside the federal guidelines and in ways which can involve no forbidden entanglements. The State complains that the federal expert witnesses had never *personally* conducted a benefit eligibility hearing involving a church employee. But the State, upon the trial, never raised a question as to the relevance, expertise or competency of the testimony of those witnesses.

The district court most justifiably relied in part upon the federal experts' testimony. (J. S. App. 67a-69a). But it based its conclusion respecting entanglement *also* upon what it regarded as the "*inevitable*" effect of the operation of the statute.[8] So far, therefore, as the State complains that the record evidence does not support the district court's conclusion, it raises a matter of no substance whatsoever.

The State, in this part of its argument, also seeks to make it appear that the religious parties have challenged solely the "tax side" of the program (imposition of the unemployment insurance tax) and not the "award of benefits" side (determination of benefits eligibility). The State then argues that the former "side" should be considered independently of the latter "side"; hence, so they say, the Court should disregard the potential constitutional questions which benefit determination proceedings might pose where religious school employees are involved. (California Amended Brief, 18-21). The complaint, however, challenged the imposition of the statute upon the religious entities *in its every aspect*, and specifically with respect to the benefit determination process. (J. A. 25). The district court recognized that and likewise properly

8. See, *e.g.*, decision of Oakland Office of Appeals affirming decision of Administrative Law Judge that an employee of Redwood Christian Schools, discharged for misconduct for not attending church regularly, was eligible for benefits, the decision being based upon the *agency's* determination that attending church "regularly" could mean less than weekly and at any church of the employee's choice. Supplemental Declaration of August C. Enderlin, filed December 17, 1980.

dealt with both "sides" of the statute. This argument of the State plainly raises no question of substance.

The governmental parties both argue that no excessive entanglements are necessitated in the statutory benefit eligibility determination process because whether an employee was discharged for misconduct would depend simply upon whether he or she knowingly failed to abide by an "established work rule" (which could incorporate religious requirements). The inquiry in such case would be "purely secular" (What was the "work rule" and was it knowingly violated?). The church property cases (*Jones v. Wolf*, 443 U. S. 595 (1979), etc.) so the State argues, permit precisely that kind of inquiry. (California Amended Brief, 22-24).

The attempt to reduce to a "work rule" the requirements of religious faith (in the setting of an employment by a religious ministry) calls for a vast oversimplification of factors involved.[9] The district court, however, noted

9. In footnote 13 of the State's brief (page 21), the State points to Title 22 of the California Administrative Code, Section 1256-36 (b)(1), which lists a series of situations in which an employee is *not* required to comply with a "work rule" regardless of its terms. The prospect of these situations but broadens the vista of unconstitutional entanglements necessarily presented by the application of the statute to religious ministries. For example, under Situation 2, in the footnote, the employee's noncompliance with the "work rule" would be based on its imposing "a new and unreasonable burden upon the employee." If that burden consisted of a religious duty, the state would determine whether that religious duty was an "unreasonable" burden. Similar potential entanglements are found in Situations 3, 5 and 6. In the hope of avoiding the entanglement issue, the appellants are careful to state that "the context in which an employee is not required to comply with a work rule under the above regulation is determined solely according to secular standards." This makes the effect even worse constitutionally: if the religious ministry insists that the "work rule" is not unreasonable because it is religiously required, the state may not hear of that: it must apply solely "secular standards"—thus effectively wiping out the religious claim.

that "not all doctrinally-based 'implied work rules' can be prescribed in advance; nor can religious ideals like 'fervor', which may be satisfied or breached by infinitely varied patterns of conduct, be precisely defined". (J. S. App. 70a). Further, the court examined the State's argument that only if the employees knowingly violate the religious "work rule", could there be found just cause for discharge (California Amended Brief, 21-25) and correctly concluded that "the adoption of a rule making the employee's subjective understanding of his employment terms decisive would embroil the hearing examiner in credibility questions which can only be resolved by involvement in religious issues". (J. S. App. 70a-71a).

The State correctly notes that "the mere potential" for excessive entanglement is sufficient to offend the First Amendment. *Meek v. Pittenger*, 421 U. S. 349, 371-372 (1975); *Lemon v. Kurtzman*, 403 U. S. 602, 619-620 (1971); *Catholic Bishop of Chicago v. NLRB*, 559 F. 2d 1112, 1126 (7th Cir. 1977), *aff'd.* 440 U. S. 490, 502 (1979); *Public Funds For Public Schools v. Marburger*, 358 F. Supp. 29, 41 (D. N. J. 1973), *aff'd.* 417 U. S. 961 (1974). It cannot be doubted that the thirteen examples of possible entanglement shown upon trial to be potential in the benefit eligibility determination process (see Counterstatement of the Case, *supra*, 7-8) are "excessive". The government parties choose to ignore what the government witnesses said. The United States suggests that cases such as *Yoder*[10] and *Ballard*[11] would allow the state to make the eligibility adjudications, though these would necessarily involve "some limited inquiry into religious matters." (Brief for the United States, 27, fn. 20). Obviously neither *Yoder* nor *Ballard* lend the slightest support for the legitimacy of processes which have lively potential for entanglements such as the thirteen which the record reveals. The State takes a different tack and asserts that this Court's church

10. *Wisconsin v. Yoder*, 406 U. S. 205 (1972).

11. *United States v. Ballard*, 322 U. S. 78 (1944).

property decisions (*e.g., Jones v. Wolf*, 443 U. S. 595 (1979)) may be read to mean that the state's adjudication of a religiously based "work rule" would somehow fall within the "neutral principles" analysis of those cases. What the State ignores, however, is what is of the essence of that whole line of cases from *Watson v. Jones*[12] forward—namely, that First Amendment values are plainly jeopardized when governmental proceedings are made to turn on the resolution by the state "of controversies over religious doctrine and practices". *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 449 (1969).

B. Entanglement in the Administrative Processes Required by the Code

The California Unemployment Insurance Code, if here applied, would impose on religious schools extremely extensive and complicated registration, record-keeping, reporting and informational requirements. (See California Unemployment Insurance Code, §§ 1085, 1086, 1088(a), 1088(b), 1092, 2105 and 2108, all of these being accompanied by criminal penalties.) Section 1089, if here applied, would require a religious school to post printed statements concerning benefit rights of employees within its ministry "and other matters as may be prescribed by authorized regulations".

The California Employment Development Department would be empowered to:

> (a) make investigations to determine whether a religious school, or employee thereof, is covered by the Code. See Section 1953 and *Hill v. Brisbane*, 66 Cal. App. 2d 15, 151 P. 2d 518 (1944);
>
> (b) issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records of religious institutions (Section 1953);

12. 80 U. S. (13 Wall.) 679 (1871).

(c) make an assessment, including a penalty of 10%, upon a religious school which fails to make returns, and to do so on the basis of an estimate arrived at according to whatever information may be in the Department's hands (Section 1126);

(d) assess a penalty of 25% on administrators of religious schools who, as a matter of religious conscience, willfully fail to comply with the requirement to file returns (Section 1128);

(e) obtain imposition of a lien on all religious property for failure to pay contributions (Section 1703);

(f) charge administrators or others who are responsible for religious affairs with personal liability for amounts of contributions due (Section 1735);

(g) obtain a summary judgment against a religious school for failure to pay contributions (Section 1815); and

(h) bring legal actions, in the courts of California or the United States, against religious schools and administrators to collect the amount of any delinquent employer or worker contributions, together with penalties and interest (Section 1852).

All of this is excessive entanglement between government and religion as well as an unjustifiable burden upon free religious choice. *Lemon v. Kurtzman*, 403 U. S. 602 (1971); *Catholic Bishop of Chicago v. NLRB, supra; Surinach v. Pesquera des Busquets*, 604 F. 2d 73 (1st Cir. 1979).

The religious schools are therefore required to march to orders of the government through the course of the investigatory phases of administrative action and conform their practices to government demands. After they have been burdened by investigatory, accounting and reporting requirements they must take their funds—funds held as a religious trust for their members—and apply those funds to secular governmental purposes. Only at this

point may a hearing be sought, but this is to be an administrative hearing, before a referee, and cannot touch matters of the constitutionality of the Federal Unemployment Tax Act under the Religion Clauses of the First Amendment. See *Buckeye Industries v. Secretary of Labor*, 587 F. 2d 231 (5th Cir. 1979). The referee's decision is then brought before an Appeals Board for review. The Appeals Board consists of five members, not more than two of whom need even be attorneys. (Code Section 401). This Board likewise may not judge the constitutionality of the Federal Unemployment Tax Act (and cannot be expected to reflect any expertise in the area of First Amendment liberties). Only after this administrative process has been exhausted may a religious body have access to the California state courts, and then only by means of claim for refund of amounts of money already paid.

This Court has frequently spoken a condemnation of "excessive entanglements" between church and state.

In *Walz v. Tax Commission*, 397 U. S. 664 (1970), the Court warned against governmental involvements with churches which produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." The Court warned against policies which can lead to "confrontations and conflicts" between government and churches. *Id.* at 674.

In *Lemon v. Kurtzman, supra*, the Court described as a "classic warning" Mr. Justice Harlan's separate opinion in *Walz* wherein he spoke of "programs, whose very nature is apt to entangle the state in details of administration." *Id.* at 615. The Court also warned against "sustained and detailed administrative relationships (between government and these schools) for enforcement of statutory or administrative standards." *Id.* at 621.

This Court also noted that, with respect to the grants to colleges upheld in *Tilton v. Richardson*, 403 U. S. 672 (1971), there were no entanglements:

> "There are no continuing financial relationships or dependencies, no annual audits, and no government

analysis of an institution's expenditures on secular as distinguished from religious activities." *Id.* at 688.[13]

The Court, in *Walz*, indicated that the processes of taxation of church activity (*i.e.*, tax valuation, tax liens, tax foreclosures, "and the direct confrontations and conflicts that follow in the train of those legal processes", *Walz, supra,* at 674) constitute, without more, entanglements between government and religion.

At the outset of the administrative relationship, embodied in unemployment tax coverage, the State must audit the financial records of the school.

The school is then required, on a regular basis, to make reports to the State concerning liability for contributions, and is also required to keep its books open for inspection by State auditors. The school will also have to post government notices on its premises regarding unemployment compensation, thus being made the instrument of the State in disseminating information to persons who are performing religious functions. This information may also be such as to encourage fractionalization of the school faith community.

Many other administrative commands must be obeyed, and limitless inspections and evaluations of religious matters permitted, most under criminal penalty for non-compliance. These burdens and encroachments on religious autonomy are not, as the United States contends, "innocuous". (Brief for United States, 25). They are, instead serious and unwanted impositions of government oversight upon religious bodies.

This type of entanglement, when coupled with the inhibitive element of coerced State extraction of funds intended for religious use, is "excessive entanglement" and

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13. Similar inspection was enjoined in *Surinach v. Pesquera des Busquets,* 604 F. 2d 73 (1st Cir. 1979), on the basis of its entangling nature.

impermissible by virtue of the Establishment Clause of the First Amendment.[14]

II. The Tax Injunction Act Did Not Deprive the District Court of Jurisdiction Over This Case.[15]

From the foregoing it is clear that the district court was correct in its statement that "facts of this case justify the issuance of an injunction" (J. S. App. 17a). And see *Public Funds For Public Schools v. Marburger*, 358 F. Supp. 29, 43 (D. N. J. 1973), *aff'd.* 417 U. S. 961 (1974). But it is also true, as the district court stated, that "this remedy is not available in the state court". (*Ibid.*)

While the United States argues that the Tax Injunction Act (26 U. S. C. § 1341) barred the jurisdiction of the district court to issue an injunction, it nonetheless urges that this case be decided, not on that issue, but on the merits of the constitutional issues. (Brief For United States, 21).[16] The State of California argues that the

14. *Committee For Public Education v. Regan*, 444 U. S. 646 (1980), cited by the United States, is not in point. *Regan* involved a state program of reimbursement to schools for the performance of certain secular functions. Participation by the schools in the program was entirely voluntary. Separate accounts, relating solely to reimbursable costs, were to be kept and subject to state audit. This voluntary, discrete program is in no way analogous to a state-compelled tax scheme which authorizes audit of even those expenditures relating solely to religious activities.

15. The religious parties make no contention that the Supreme Court lacks jurisdiction over this direct appeal. Hence that point is not briefed.

16. The Government, early in the litigation, had moved to dismiss on the ground that the Tax Injunction Act deprived the district court of jurisdiction. That court's preliminary injunction and opinion of September 21, 1979, denied that motion, and the Government then timely appealed to the Ninth Circuit which, on July 24, 1980, dismissed the appeal (following a stipulation by all parties for dismissal). While the present appeal insofar as it pertains to the non-church-operated schools, is timely, in that the district court issued an injunction protecting them only on April 6, 1981, it is questionable

United States is in error in its contention respecting the Tax Injunction Act, in that (a) the religious plaintiffs could not have obtained complete relief without its joinder and (b) the United States could not be compelled to submit to state court jurisdiction; hence the religious plaintiffs would not have had a plain, speedy or efficient remedy in the California courts. California, too, seeks disposition on the merits. (California Amended Brief, 35).

The religious parties agree with both governmental parties that the case should be decided on the merits, but for two reasons disagree with the assertion of the United States that the Tax Injunction Act deprived the district court of subject matter jurisdiction: (a) The state court remedy, if not absolutely barred by state law, is at best uncertain rather than "plain"; (b) The availability of the state court remedy is conditioned upon the involvement of pervasively religious ministries in excessively entangling processes of governmental inquiry.

A. Non-Existence of State Court Remedy

The Constitution of the State of California, Article XIII, section 32, provides:

> "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of *any tax*." (Emphasis supplied)[17]

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16. (Cont'd.)

whether the appeal, insofar as it pertains to the Tax Injunction Act, should be regarded as timely. If not, it should, in that respect, be dismissed.

17. The United States contends that a similar, but prior, version of this provision was not applicable to unemployment taxes. (Brief For United States, 20 n. 13). This is correct, but completely inapposite. The prior provision had application only to taxes levied under former Article XIII of the California Constitution, but the present provision clearly applies to "any tax."

Additionally, the California Unemployment Insurance Code, § 1851 provides:

> "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin the collection of any contribution sought to be collected under this division."

While the district court, citing some California decisions dating from 1914 to 1942 (which it called "neither compelling nor recent" authority) was willing to conclude that "the availability of injunctive relief in State court is, at best, uncertain" (J. S. App. 17a), it would be more precise to say that that availability is absolutely barred by the California Constitution and the California statute, whose plain terms admit of no exceptions.[18] But even if the remedy in California is "at best uncertain", "[u]ncertainty concerning a State's remedy may make it less 'plain' under 28 U. S. C. § 1341." *Tully v. Griffin, Inc.*, 429 U. S. 68, 76 (1976). This Court most recently reiterated this point in *Rosewell v. LaSalle National Bank*, 450 U. S. 503, 517 (1981).

B. The California Procedure Is Constitutionally Defective.

While the United States relies principally upon *Rosewell, supra*, that case does not bar injunctive relief under the circumstances here present. Even if *Rosewell* were to be read as broadly as the United States asserts, it is clear

18. Several constitutional challenges to these California anti-injunction provisions have been raised, but all have met with decisive unreceptiveness in the California courts. See *Lorco Properties, Inc. v. Department of Benefit Payments*, 57 C. A. 3d 809, 129 Cal. Rptr. 312 (1976); *Pacific Gas & Electric Co. v. State Board of Equalization*, 27 Cal. 3d 282, 165 Cal. Rptr. 122 (1980). In the latter case, the California Supreme Court held that even an allegation that being barred from injunctive relief rendered the remedy under the taxing act constitutionally "inadequate" could not overcome the bar.

that the California procedural criteria do not plainly, speedily or efficiently relieve religious bodies from constitutional harm.

The religious plaintiffs below presented First Amendment claims obviously calling for prompt disposition by a body competent to adjudge those claims. Section 3.5 of Article III of the California Constitution provides:

> "An administrative agency . . . has no power . . . (b) to declare a statute unconstitutional."

The plaintiffs, if forced to pursue their pressing claims via administrative agencies, would have been detoured into a briarpatch of entanglements between government and religion. That detour would not have been "plain, speedy and efficient" but complicated, slow, inefficient and—to religious bodies which accept no public aid and have but modest means through voluntary contributions of the faithful—inordinately expensive.

The "remedy" which appellees would have been forced to pursue, if turned away from federal court under Section 1341, would have been no remedy at all. For to force religious persons to entangle themselves with government, in the form of the full range of California administrative regulation, investigation and adjudication, is precisely the kind of constitutional damage which appellees had sought to avoid by instituting this action. This administrative relationship between government and religion, touching sensitive areas of religious concern central to the religious mission of these religious organizations, is here a source of harm to fundamental liberties. This administrative relationship is scarcely the remedy for the harm it inflicts. Again, it is to be noted that this Court has recognized:

> "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the *very process of inquiry* leading to findings and conclusions." *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 502 (1979) (Emphasis supplied).

The California Unemployment Insurance Code, as has been seen, would impose on religious schools extremely extensive and complicated registration, record-keeping, reporting and informational requirements, as well as subjecting them to audits, investigations and adjudications of matters touching upon religious doctrine, practice and morality.

Religious schools thus face the choice of either obeying religious conscience by refusing to permit the government to intrude upon their religious mission (and thereby subjecting themselves to personal loss, to the diverting of funds intended for religious uses, and bringing on financial hardship), or foregoing the exercise of religious conscience (under government edict) by complying with the unemployment insurance procedural requirements. *Sherbert v. Verner*, 374 U. S. 398, 404 (1963); *Thomas v. Review Board*, 450 U. S. 707, 717 (1981). Their religious liberties, under the prescribed procedure, would be at least temporarily suspended by government. But liberties suspended are liberties lost, and where fundamental liberties are in jeopardy of being lost, this Court has held that the lesser government concerns with administrative convenience must give way. Thus, where challenge is raised not merely to possible final outcome of an administrative procedure, but rather to the constitutionality of the procedure itself, a federal court need not stand by until the damage has been done, *Public Utilities Commission of California v. United States*, 355 U. S. 534, 539 (1958); *Glover v. St. Louis-San Francisco Railway Co.*, 393 U. S. 324, 330 (1969); *Weinberger v. Salfi*, 422 U. S. 749, 765 (1975); *Matthews v. Diaz*, 426 U. S. 67, 73 (1976); *Califano v. Sanders*, 430 U. S. 99, 109 (1977); *Moore v. City of East Cleveland*, 431 U. S. 494 (1977), Burger, J. dissenting at 528, n. 3; and *Oestereich v. Selective Service Board*, 393 U. S. 233, 241 (1968), Harlan, J., concurring.

While this Court has held that § 1341 will not bar federal jurisdiction where the presence of an adequate state remedy is "uncertain", *Spector Motor Service v. McLaugh-*

lin, 323 U. S. 101 (1944), *Township of Hillsborough v. Cromwell*, 326 U. S. 620 (1946), it has most recently pointed out that "A federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue *except in cases where an asserted federal right might otherwise be lost*". *Tully v. Griffin, Inc.*, 428 U. S. 68, 73 (1976). (Emphasis supplied). It is difficult to imagine a situation where it is more "certain" that fundamental rights would be lost without federal intervention than that presented by the instant case. Even in the pure property right situation involved in *Tully*, the Supreme Court was concerned over whether New York law permitted preliminary court relief to persons facing a sales tax assessment. As already demonstrated herein, Section 1851 of the California Unemployment Insurance Code and Article XIII, Section 32, of the California Constitution prohibit all such court relief.

Nothing stated in *Rosewell* in any way derogates from this Court's prior insistence that fundamental freedoms are not to be denied for the sake of administrative regularity. The California procedure, inasmuch as it does not respect the proper spheres of religion and state as decreed by the Religion Clauses, is itself unconstitutional when applied to religious bodies.

The district court, on well established grounds, was thus correct in holding that the Tax Injunction Act did not deprive the court of jurisdiction.

III. Imposition of the Federal-State Unemployment Tax Program on Pervasively Religious Schools Violates Free Exercise Rights of Those Schools, of Teachers Pursuing a Religious Vocation Therein, and of Parents Whose Children Are Enrolled Therein.

The complaint sets forth seven ways in which Free Exercise rights would here be violated through imposition of the Unemployment Tax Act.[19] The district court spe-

19. (a) It imposes a tax and other financial burdens upon purely religious activity; (b) it imposes burdens of accounting and

cifically dealt with but one of these—namely, the taxing of a ministry. The threefold basis for the district court's conclusion that no Free Exercise violation results from such taxation is: (a) the tax is "indirect"—*i.e.*, it is not directly on a religious activity, (b) the tax is an "insufficient burden" on religious freedom to justify holding it unconstitutional, (c) a compelling state interest justifies imposing the tax. To the contrary, it is clear that:

A. The Tax Affects Religious Activity.

If the tax in question does not directly weigh upon religious activity, then no constitutional issue is posed by it. The court below stated two reasons that the tax should not be held to directly affect religious activity: It "is collected from religious institutions, not from individual religious believers". (J. S. App. 62a). Second, the tax "is imposed upon the employment relationship and not upon

19. (Cont'd.)

reporting upon religious ministries; (c) it reaches into churches and places under an unsolicited government program of employee benefits, church employees who are engaged in carrying out a religious ministry; (d) it burdens and endangers the ability of parents to choose a religious education for their children; (e) it burdens and endangers the opportunity of religious teachers to carry out their religious vocation in the Christian formation and education of young people; (f) it burdens and endangers pastors of churches and religious administrators of religious schools in the exercise of their religious ministry in education; (g) under familiar principles of unemployment compensation law, and under the laws of California, an award of unemployment compensation may depend upon a determination having been made by a governmental entity of whether there was termination of employment for "just cause". Termination of employment from a religious entity, however, may in given instances be on religious (including moral) grounds. Yet a governmental agency rendering the "just cause" determination may not base its determination upon religious principles but solely upon secular standards. Thus the religious ministries may be required to pay unemployment compensation where dismissal was based upon religious grounds.

individual religious acts". *Ibid.* Neither point is correct, though each is of high constitutional significance in the premises. Obviously, the fact that a tax is collected from religious institutions, and not from individual religious believers, does not relieve the tax of any possible unconstitutional feature; indeed, a tax on some religious institutions may be tantamount to a tax on individual religious believers, or on religious activity itself. The court was plainly incorrect in the conclusion at which it arrived in the following key statement:

> "It is true that individual teachers and administrators may view their work as a religious calling and that the primary purpose of religious schools is to inculcate religious doctrine. It is also true that administrators of religious schools may hire or terminate employees on religious grounds. However, none of the foregoing facts transforms the hiring or firing of a teacher, or the payment of his salary, from a secular to a religious act analogous to preaching. To hold otherwise would be to adopt the view that any thing or activity remotely connected to the exercise of religion or to those who engage in it is constitutionally immunized from taxation." (J. S. App. 12a).

The trial record, however, discloses that the employment relationship, in the schools here involved, is *completely* religious, and that no valid separation can be made between (a) the pervasively religious entity which is the school, (b) the teacher pursuing a religious vocation within that entity, and (c) those bonds of discipline, communication, interaction and common discipleship between the two which constitute the employment relationship (J. A. 89-90). Teachers in the Christian schools are hired for religious reasons; in most cases firing would also be for such reasons, whether related directly to doctrine, to morality, to level of fervor or to classroom proficiency—even the last-mentioned being considered part of the duty of faithful witness (J. A. 90-91). The views of the district

court on this point are a throwback to assumptions advanced by Pennsylvania and Rhode Island in the *Lemon-DiCenso* litigations[20]—namely, that the religious schools there considered could be viewed as being composed of various "religious" and (discrete) "secular" components. This view the Supreme Court rejected seeing, instead, that such schools are unitary organisms, pervasively religious and incapable of a religious-secular bifurcation. *Lemon v. Kurtzman, supra,* at 617; *Meek v. Pittenger,* 421 U. S. 349, 366 (1975).

The district court, thus viewing the employment relationship in the Christian school as only "remotely connected to the exercise of religion", states that the Supreme Court, in its *Murdock*[21] and *Follet*[22] decisions did not intend that such activity would be "constitutionally immunized from taxation" (J. S. App. 62a). Those decisions the court misapplies. They stand as bedrock decisions against the taxation of religious activity. Thus they support the position of the religious parties before the Court whose activity, in the form of the employment relationship, is the religious keystone of their enterprises. There can be no doubt that, whether unconstitutionally or not, the unemployment compensation tax burdens an activity which is undeniably religious.

B. The Tax Unconstitutionally Burdens Religious Free Exercise.

The district court states: "In short, the injury to Free Exercise rights asserted by plaintiffs ultimately comes down to the financial burden imposed by the extension of the unemployment compensation tax to these schools" (J. S. App. 60a-61a). The court held the imposing of the tax to be constitutionally inoffensive because, so the court believed, the tax burden was not "signifi-

20. See *Lemon v. Kurtzman,* 403 U. S. 602 (1971).

21. *Murdock v. Pennsylvania,* 319 U. S. 105 (1943).

22. *Follett v. McCormick,* 321 U. S. 573 (1944).

cantly" heavy. Here the court mistakenly relied, for its legal conclusion, upon dictum of the Supreme Court in *Braunfeld v. Brown*, 366 U. S. 599 (1961) and, for its factual conclusion, upon "the record as a whole". In both of its conclusions the court erred.

The dictum from *Braunfeld* in no sense sustains a principle that government may tax religious activities or enterprises if the only effect of the tax is to render these (in the words of the district court) "somewhat more expensive". Obviously, to render any activity "more expensive" may retard that activity. *Braunfeld* involved a state's Sunday closing law challenged by Orthodox Jewish merchants under the Free Exercise Clause. The law barred them from selling on Sunday, while their religion barred them from selling on Saturday. The combined effect was potentially to reduce their personal incomes. No tax was involved, and no imposition directly upon a religious activity, practice or relationship. The closing law did not bar, refer to, or in any way deal with the Orthodox Jewish Sabbath or services. Nor did it deal with religious observance on Sundays. It simply regulated secular activity on the latter days. Hence the Court was able to characterize the law's effect on the Orthodox Jewish merchants as "indirect". *Id.* at 607.[23] This is radically different from the situation at bar where not only is a tax involved but that tax is imposed directly on a critically important aspect of the religious enterprise.

The district court's employment of the *Braunfeld* dictum in the premises calls for this Court's correction because the principle is erroneous and dangerous, that the dollar-amount *smallness* of a tax on religion absolves that tax from unconstitutionality. Certainly in Establishment Clause cases the Supreme Court has most carefully stressed that the dollar-amount smallness of an exaction of pub-

23. But see concurring opinion of Justice Stewart in *Sherbert v. Verner*, 374 U. S. 368, 418 (1963) in which he concluded that *Braunfeld* cannot stand consistently with *Sherbert* and argued that "the *Braunfeld* case was wrongly decided and should be overruled."

lic funds for religious purposes does not relieve the exaction of unconstitutionality. *Committee For Public Education v. Nyquist*, 413 U. S. 756, 787 (1973). And see Justice Black's famous discussion in *Everson v. Board of Education*, 330 U. S. 1, 16 (1947), that the Establishment Clause means, at least, that "No tax, *in any amount, large or small*," for religious purposes may be valid. (Emphasis supplied). Madison's remark, in his *Memorial and Remonstrance* about "three pence"[24] has been cited with approbation by this Court. See *Flast v. Cohen*, 392 U. S. 83, 103 (1968). The same reasoning would appear essential in free exercise situations where government claims it may tax religion provided that the tax is merely small ("incidental"). If religion can be taxed a little, why not greatly? And if religion can be taxed a little with one tax, why not a little again with another tax—and still again other "small" taxes?[25]

The trial record herein does indeed show uncontradicted testimony of religious plaintiffs below that the unemployment tax would have heavy impact upon them (J. A. 96-98). The schools in question refuse, upon Scriptural grounds, to accept *any* local, state or federal programs of

24. ". . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 WRITINGS OF JAMES MADISON, 183, 186 (Hunt ed. 1901).

25. The district court attempts to minimize the impact of the unemployment tax by stating that a nonprofit employer is free to elect the reimbursement method of contribution (J. S. App. 63a). That, and the fact that the tax is thus different from the taxes seen in *Murdock* and *Follett*, the court offers as additional reasons for holding the unemployment tax inoffensive. But regardless of the "reimbursement" option, both the tax and the entire program would be imposed. And the fact that this tax differs from the taxes examined in *Murdock* and *Follett* is irrelevant. The Supreme Court has never indulged the apparent presumption of the district court—namely, to hold that the taxes invalidated in those cases exhausted the list of all possible unconstitutional taxes.

aid. They depend solely upon the voluntary contributions of their faith communities (J. A. 96-97). Although teachers are paid minimum wages, much of the instruction is also supplemented by aides who volunteer their time (J. A. 94). It is obvious that, in a day of growing personal taxation and inflation, *no* tax burden upon the enterprise may be dismissed as "incidental" or "small."

Further, the tax is exacted as a necessary condition to the pursuit of the religious employment relationship, because failure to pay the tax, and failure to undertake and pay for the administration of the tax program within the religious institution, results in the imposition of damaging, and ultimately crippling, penalties upon the institution. See, for example, California Unemployment Insurance Code Sections 1126 (10% penalty), 1129 (interest), 1135 (delinquent assessments), 1137 (jeopardy assessment), 1755 (levy), 1785 (warrant for enforcement of liens), and 1787 (expenses of levying and execution of warrant). The Court should also note that in addition to penalties against the institution, the persons in control of the institutions' funds who refuse to pay the amounts "due" are personally liable for such amounts (Section 1757), and are subject to criminal penalties for nonpayment (Section 2108—nonpayment, a misdemeanor). Of course, even failing to submit "required" reports can result in a criminal conviction (Sections 2106, 2109 and 2112).

Moreover, the challenged program would extract from a religious body its religiously entrusted funds, which are devoted entirely to religious purposes, and require their transfer to governmentally determined secular uses. See *Walz v. Tax Commission*, 397 U. S. 664, 675 (1970), and note Justice Brennan's concurrence at 692.

The district court's opinion omits any discussion of other specific claims which the religious parties have made under the Free Exercise Clause in their complaint. Each of these claims was supported by substantial evidence. For example:

Governmental conditioning of employment relationships, within religious institutions. The testimony of Government witnesses showed that it is a national practice under the Act to plunge boldly into religious issues (J. A. 117-124, 132-148, 174-185). This necessarily chills the exercise of religious liberty within the religious body, it being known that the propriety of every discharge is subject to review by government (though if the governmental body would decline to consider religious reasons for the discharge, an equally oppressive burden would be placed upon the institution's liberty to govern its ministry).

Imposition upon the right to pursue a religious vocation. The Supreme Court has noted that "the church-teacher relationship in a church-operated school differs from the relationship in a public or other non-religious school". *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 504 (1979). The teachers in the present case are unquestionably pursuing a ministry, apostolate, or religious vocation. (T. 104-113). And see *McDaniel v. Paty*, 435 U. S. 618, 626 (1978). Testimony was presented that their settled belief in the providence of God causes them to reject a substituted governmental providence. (T. 109-111).

Injury to religious rights of parents. The trial record shows that the free exercise rights of parents are threatened by the imposition of the program. Parent plaintiffs testified that they are a prime source of the schools' funding and that the unemployment tax imposes on their schools an additional cost for a program unrelated to Christian education. They also believe that the program would lead to the presence of religiously undesirable teachers in the school (T. 115).

C. Imposition of the Tax Is Not Justified by a Compelling State Interest.

The district court, on the question of compelling state interest, holds that the tax scheme "meets the *Braunfeld* criteria for validity under the Free Exercise Clause"

(J. S. App. 64a). While, as noted *supra*, it is quite possible that *Braunfeld* may now be read as inconsistent with the test set forth in *Sherbert*, it is in any event clear that no state interest is here present which would jusify the subordination of the free exercise claims advanced. The district court, devoting but a half page (J. S. App. 65a) to discussion of compelling state interest, points to nothing in the record to substantiate its broad claim that the imposition of the tax program on the religious ministries in question is necessitated if the adverse effects of unemployment nationally are to be diminished through the operation of FUTA.

In *Sherbert* the State countered the religious claimant's demand for unemployment compensation benefits with an assertion, comparable to that of the district court here, that the integrity of the unemployment compensation program would be harmed were the religious claim to be recognized and that, therefore, a compelling state interest justified denial of the claim. *Sherbert, supra*, at 407. Neither there, nor here, does "the record appear to sustain [the government's contention]." *Ibid.* The Court in *Sherbert* compared that case with the facts of *Braunfeld*, noting that, in the latter, the requiring of exemptions for Sabbatarians would have presented "an administrative program of such magnitude, and afforded the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable". *Id.* at 408-409. No comparable factors appear in the present case.

The Court in *Sherbert*, also held it incumbent upon the State "to demonstrate that no alternative forms of regulation would combat such abuses [the alleged threats to the integrity of the unemployment compensation program] without infringing First Amendment rights". *Id.* at 407. In the present case neither the Government nor the district court has offered such demonstration. Plainly none could be offered. Just as in *Murdock, supra*, it is clear that the governmental interests which the tax is de-

signed to support will be realized without imposing the tax on the religious activity in question.

IV. Imposition of the Federal-State Unemployment Tax Program Upon Pervasively Religious Schools Which, Though Not Operated by Churches, Are Indistinguishable in Character From Them in Religious Character and Mission, Violates Rights Guaranteed Such Schools by the Equal Protection Clause of the Fourteenth Amendment.

The district court well stated the equal protection claim of the non-church-affiliated fundamentalist school plaintiffs:

> Essentially, they argue that the exemption scheme embodied in 26 U. S. C. § 3309(b)(1)(A) and (B) and Cal. Unempl. Ins. Code § 634.5(a)(1) and (2) arbitrarily discriminates against religious schools without church affiliation and in favor of religious schools controlled and operated, directly or indirectly, by the institutionalized religious sects or denominations. The discrimination arises from the fact that the statutes under consideration, when construed according to their plain meaning, impose the financial burden of the unemployment compensation tax upon the independent religious schools while exempting the church-affiliated schools. The Grace Brethren plaintiffs argue that this disparate treatment of church-affiliated and non-church-affiliated schools is a violation of the Equal Protection Clause. (J. S. App. 75a)

The district court found it not necessary to reach the merits of the plaintiffs' equal protection argument in view of its determination that application of the unemployment compensation scheme to employees of the non-church schools would involve "impermissible entanglement of the state with religion." (J. S. App. 76a). The court, however, correctly reasoned that, "[b]y classifying schools according to formal church affiliation, rather than religious

mission and curriculum content, and by subjecting non-church-affiliated schools to a financial burden from which church-affiliated schools are exempt, Congress and the California legislature have accorded differential treatment to religious organizations which may well have equal status under the First Amendment." (*Ibid.*)

The federal parties argue that a rational basis exists for distinguishing the church-affiliated schools from the religious schools here considered and that indeed "even these [non-church schools] with a strong religious orientation, should be treated like secular schools . . ." (Brief for the United States, 38). But the United States must demonstrate more than a mere "rational basis" for discriminating among pervasively religious institutions which are exercising fundamental First Amendment freedoms. Instead, statutory classifications treating such institutions disparately are subject to strict judicial scrutiny. *San Antonio Independent School District v. Rodriguez*, 411 U. S. 1, 34 n. 75 (1973), *Carey v. Brown*, 447 U. S. 455, 462 (1980).

Nonetheless, not even the United States, claimed rational basis can be demonstrated. The United States makes four assertions, none of which are supportable:

> (1) That church-run schools "are more likely to have a strong and specific religious orientation than interdenominational schools or those established and run by the laity."[26] (*Ibid.*) This is the merest

26. As the Second Circuit stated in a case wherein a governmental agency claimed that legal affiliation with a church is determinative of the religious character of a school:

> "It is the suffusion of religion into the curriculum and the mandate of the faculty to infuse the students with the religious values of a religious creed which create the conflict with the Religion Clauses and not the vesting of legal title or the responsibility of operation." *NLRB v. Bishop Ford Central Catholic High School*, 623 F. 2d 818, 823 (2d Cir. 1980), *cert. denied*, 450 U. S. 996 (1981).

speculation, completely contradicted by the extensive record herein (J. A. 71-77, 82-188). A more strong and specific religious orientation could scarcely be imagined than that obtaining in Redwood Christian Schools.

(2) That "the risk of church-political entanglement is greater when church-controlled schools are involved." (*Ibid.*) This is guesswork; political entanglement appears confined to situations where religious groups (not necessarily a church) seek subsidy. *Lemon v. Kurtzman, supra,* at 622-623. How the "political entanglement" assertion is relevant is not clear.

(3) That "there is a greater likelihood that employees of church-controlled schools will be provided with non-governmental assistance, through church relief programs, for economic hardship caused by unemployment." (*Id.* at 39). This, again, is simply speculation completely without record support and not responsive to any constitutional claim raised by the Christian schools in question.

(4) That "the distinction is practical to administer." While neither the State nor the federal government introduced evidence to support that conclusion, the point is irrelevant. First, administrative convenience may not be held to outweigh the enjoyment of First Amendment liberties. Second, the pervasively religious nature of Redwood Christian Schools is already established as of record in this case. Nor is any constitutional problem occasioned in the determination of whether a non-church religious school is really "religious." Under many familiar laws (*e.g.*, § 501(c)(3) of the Internal Revenue Code), determinations are routinely made that organizations are "religious in purpose. Indeed, the "Category II" schools, in order to be exempt under 26 U. S. C. § 3309(b)(1)(B) must be found to be operated for "religious

purposes'' *and* be operated, etc. by a church or convention or association of churches. The simple inquiry needed therefor does not involve inquiry into matters of doctrine.

Equally unfounded is the State's contention that the non-church religious schools should be regarded as secular under the statute, since otherwise there will be necessitated ''inquiry into the merits of the particular religious doctrines'' of such schools. (California Amended Brief, 32). No inquiry as to the merits, or lack thereof, of religious doctrine is involved in the identifying of any school as religious.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that this Court should affirm the judgment of the district court in Nos. 81-31 and 81-228 and reverse the judgment of the district court in No. 81-455.

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Nos. 81-31, 81-228
and 81-455
IN THE

Supreme Court of the United States

October Term, 1981

GRACE BRETHREN CHURCH and REVEREND DAVID L. HOCKING, etc., *et al.*,

Appellees,

vs.

STATE OF CALIFORNIA, *et al.*,

Appellants.

THE LUTHERAN CHURCH-MISSOURI SYNOD, etc., *et al.*,

Appellees,

vs.

STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, *et al.*,

Appellants.

On Appeal from the United States District Court for the Central District of California.

Brief of Appellees, The Lutheran Church-Missouri Synod, St. John's Lutheran Church, and Vivadell Keiser.

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Nos. 81-31, 81-228
and 81-455
IN THE

Supreme Court of the United States

October Term, 1981

GRACE BRETHREN CHURCH and REVEREND DAVID L. HOCKING, etc., *et al.*,

Appellees,

vs.

STATE OF CALIFORNIA, *et al.*,

Appellants.

THE LUTHERAN CHURCH-MISSOURI SYNOD, etc., *et al.*,

Appellees,

vs.

STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, *et al.*,

Appellants.

Brief of Appellees, The Lutheran Church-Missouri Synod, St. John's Lutheran Church, and Vivadell Keiser.

I.

COUNTERSTATEMENT OF THE CASE.

Appellee The Lutheran Church-Missouri Synod ("the Synod") is a non-profit membership corporation whose members are Lutheran congregations, a number of which

operate primary or secondary schools. One such congregation is appellee St. John's Lutheran Church. Appellee Vivadell Keiser was a teacher at St. John's Lutheran Church when this litigation commenced.[1]

The Lutheran plaintiffs' complaint for declaratory and injunctive relief against the application of the joint federal-state unemployment tax scheme to schools operated, supervised and controlled by member congregations of the Synod was originally filed in the Superior Court of the State of California for the County of Los Angeles. The action was removed to the United States District Court for the Central District of California by the defendant United States Secretary of Labor (the "Secretary"). The Lutheran plaintiffs sought to enjoin the collection of unemployment taxes as well as the collection of information used by the State of California ("the State") in imposing the tax. The Lutheran plaintiffs argued that the schools operated by Synod members were exempt from the tax on statutory grounds and because imposition of the unemployment tax scheme upon those schools violated the first amendment to the United States Constitution.

In the District Court, the Lutheran plaintiffs' action was consolidated for trial with a similar action brought by the Grace Brethren Church, its pastor, the Christian Unified Schools of San Diego, the Redwood Christian Schools, and a number of individuals variously associated with the foregoing ("the Grace Brethren plaintiffs"). Following trial of this matter, the District Court rendered findings of fact and conclusions of law in favor of the Lutheran plaintiffs and the Grace Brethren plaintiffs. (*See* Jurisdictional Statement of the State of California in No. 81-31 ("State's Jurisdic-

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[1]Appellees the Synod, St. John's Lutheran Church, and Vivadell Keiser will be designated "the Lutheran plaintiffs" herein.

tional Statement"), App. A, p. 1; App. B, p. 45; App. C, p. 49)

The District Court found that all of the Lutheran plaintiffs' schools were either without a separate legal existence from the churches by which they were operated ("Category I schools") or were operated as separate corporations by a church or association of churches ("Category II schools"). The District Court concluded that these two categories of schools were exempted from the unemployment tax scheme by the plain meaning of the statute under consideration. (State's Jurisdictional Statement, App. C, p. 50; App. E, p. 71) The District Court recognized a third category, non-affiliated religious schools, and concluded that the Category III schools, which were operated by the Grace Brethren plaintiffs, were not exempted by virtue of the "plain meaning" of the California statute. (State's Jurisdictional Statement, App. A, pp. 3-15; App. B, p. 50) The District Court held, however, that to apply the unemployment tax scheme to the Category I, II, or III schools would result in entanglement between church and state forbidden by the first amendment to the United States Constitution. (State's Jurisdictional Statement, App. B, pp. 46-47; App. C, pp. 49-50)[2]

The Secretary[3] and the State[4] appealed directly to this Court[5] from the holding of the District Court. Neither appellant challenged the judgment of the District Court insofar

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[2]Since the Lutheran plaintiffs do not operate any Category III schools, plaintiffs have not treated the "equal protection" issues addressed by the State at pp. 31-35 of its amended brief.

[3]*See* Secretary's Jurisdictional Statement, App. G, p. 91a.

[4]*See* State's Jurisdictional Statement, App. I, p. 88.

[5]Pursuant to 28 U.S.C. § 1252.

as it was based upon statutory grounds.[6] (*See* State's Jurisdictional Statement, pp. 11-12 & n.4; Jurisdictional Statement of the Secretary in No. 81-228 ("Secretary's Jurisdictional Statement"), p. 6, n.5)

The Lutheran plaintiffs moved to affirm the judgment of the District Court on the grounds that (i) any issues regarding the proper construction of the unemployment tax statutes were insubstantial after the holding of the Court in *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), and (ii) that the State had specifically disclaimed any intention of bringing before the Court the issue of statutory construction. The Court postponed ruling on the Lutheran plaintiffs' motion until the case could be argued on its merits.

II.
ARGUMENT.

A. The Unemployment Tax Scheme Presents the Potential for Excessive Entanglement Between Church and State.

The first amendment's guarantee that "Congress shall make no law respecting an establishment of religion" is not confined to prohibiting governmental assistance to religion. *NLRB v. Catholic Bishop*, 440 U.S. 490, 501-04 (1979); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 668, 674 (1970); *Abington School District v. Schempp*, 374 U.S. 203, 216, 217 (1963); *Engel v. Vitale*, 370 U.S. 421, 429, 436 (1962); *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

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[6]Inasmuch as the District Court's judgment in the Lutheran case was based upon its interpretation of the statutes under consideration as well as its holding on the issue of constitutionality, the instant appeal has no effect upon the judgment of the District Court as to the Lutheran plaintiffs.

The establishment clause is violated not only if the government intentionally establishes, sponsors, or financially supports religion, but also if the actions of the government result in an *excessive entanglement* with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970); *United States v. Holmes*, 614 F.2d 985, 988 (5th Cir. 1980).

1. The Unemployment Tax Collection Process Must Result in Excessive Entanglement.

The potential for excessive entanglement was the basis for this Court's finding in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that statutes of Rhode Island and Pennsylvania establishing programs for financial aid to non-public schools were unconstitutional. The statutes of both states provided for surveillance to ensure that the state aid went to support secular education only. Nevertheless, the Court held the statutes invalid, reasoning that the degree of supervision required to guarantee that the subsidized teachers and activities did not promote religion would necessarily offend the establishment clause. With respect to the Rhode Island statute, the Court stated:

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.
>
> There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average

per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. (*Id.* at 619-20. *Accord, Wolman v. Walter*, 433 U.S. 229, 254 (1977). ("[P]ublic school authorities will be unable adequately to insure secular use of field trip funds without close supervision of the nonpublic teachers. This would create excessive entanglement.").)

With respect to the Pennsylvania statute, the Court stated:

> [T]he very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction. (403 U.S. at 620-21)

Earlier, in *Walz v. Tax Commission*, 397 U.S. 664 (1970), the Court had upheld the property tax exemption granted to certain church-owned property. The Court correctly concluded that there was far less government entanglement

involved in a tax exemption than in taxing the church. *Id.* at 674-77.

Most recently, in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), the Court affirmed the decision of the Seventh Circuit in refusing to uphold an NLRB assertion of jurisdiction over parochial schools. Although the Court based its decision on "the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board" (*Id.* at 501, 506-07), the opinion leaves no doubt that the NLRB assertion of jurisdiction threatened impermissible entanglement between the church and state. The Court stated:

> [I]t is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F.2d at 1125, 1126. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. *It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions.* (440 U.S. at 502. (Footnote omitted; emphasis supplied.))

Many of the same entanglements the Court condemned in *Lemon* and *Catholic Bishop* are also present here. The incidents of entanglement inherent in the collection of unemployment tax and tax information include registration of the church with the Employment Development Department (*Cal. Unemployment Ins. Code* § 1086); maintenance by the church, for use by the State, of wage records and "such

other information as the director deems necessary"; submission by the church to the State of quarterly returns and reports for "covered" employees for each pay period, presumably including a separation of time spent performing "strictly church duties" (*Cal. Unemployment Ins. Code* § 1088); posting of printed statements at schools operated by the Synod's churches regarding benefit rights "and other matters as may be prescribed by authorized regulations" (*Cal. Unemployment Ins. Code* § 1089); investigations and audits to determine whether a particular employee is covered (for each pay period) and to determine whether an employee has performed "strictly church duties" for at least half of his working time (*Cal. Unemployment Ins. Code* §§ 1126-1132); reassessment proceedings to resolve any dispute as to whether a particular employee is performing "strictly church duties" (*Cal. Unemployment Ins. Code* §§ 1133-34, 1951-56); and collection of disputed taxes using court actions, tax liens, foreclosure proceedings and personal liability of pastors and other church officials. (*Cal. Unemployment Ins. Code* §§ 1701 *et seq.*)

Throughout the litigation until the time of trial the Secretary took the position that teachers in Category I and Category II schools were excluded only when performing "strictly church duties". (*See* Plaintiff's Trial Exhibit 33) Despite the importance of the Synod's schools to its religious mission, the Secretary decided that the operation of these schools did not amount to a "strictly church duty." In an apparent change of position, and in an apparent attempt to minimize the impermissible entanglement which pervades the unemployment tax scheme as interpreted, the Secretary took the position at trial that no services performed at church-operated schools could be "strictly church duties." (*See, e.g.*, Reporter's Transcript ("RT") at p. 127, lines

7-11) Even if one were to assume that the Secretary's *new*[7] "strictly church duties" test was understood and applied as described, impermissible entanglement is still inherent in the process. Counsel for the Secretary admitted that even under the "new" test it would be necessary for the church to separate (and presumably keep records) on a monthly basis for each employee, those services performed for "the school" from those services performed for "the church." (*See, e.g.*, RT at p. 128, line 21 to p. 129, line 19) Even if it were possible to determine whether a teacher spent

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[7]On at least five prior occasions the Secretary had taken a different position. For example, on May 23, 1979, at a hearing in this matter, Mr. Sheinfeld, counsel for the Secretary, took the position that all teachers of "secular" subjects were covered whereas a teacher of "religion" might not be covered. (*See* Reporter's Transcript of Proceedings, May 23, 1979 at p. 108, lines 22-25, "Certainly, a teacher who taught religion and the course was labeled 'Religion' and that is the only course they taught, you are going to run into a line-drawn [sic] situation, your Honor."; and p. 123, line 25 to p. 124, line 1, "We still say that a person teaching English or German or chemistry is a teacher and Congress intended that teachers be covered.") Mr. Raymond, counsel for the Secretary, took the same position—that teachers of certain subjects were excluded—in a hearing before the District Court on January 28, 1980. Likewise, the Secretary's writings prior to the trial assumed that certain teachers were exempt. Plaintiffs' Trial Exhibit 33, a letter dated April 18, 1978 from the Secretary to Bishop Kelly, contains the following language: "In light of the repeal of 3309(b)(3), we think the only services performed in the schools that may reasonably be considered within the scope of the exclusion permitted by 3309(b)(1) are those strictly church duties performed by church employees pursuant to their religious responsibilities within the schools." Plaintiffs' Trial Exhibit 34, a memorandum dated May 30, 1978 from the Department of Labor to All State Employment Security Agencies, contains almost identical language. Plaintiffs' Trial Exhibit 44, which is a memorandum from the Department of Labor to All State Agency Administrators states: "With respect to services performed in elementary and secondary schools that are church-related, some employment in the schools may be of a type that would come within the scope of the exemption permitted by section 3309(b)(1), FUTA, if the services performed are strictly church duties performed by church employees at the schools pursuant to their religious responsibilities." There is no evidence, other than Mr. Sheinfeld's statement at the trial, that the Secretary's position has changed from that repeated on at least the five prior occasions described above.

more time with a day school class than with the church youth groups, that a janitor spent more time cleaning the school than cleaning the house of worship, or that a secretary spent more time taking attendance than mailing church bulletins, the day-to-day surveillance involved in such a breakdown would itself violate the first amendment.

Appellants have no authority consistent with the Constitution to make such a decision because such authority would give the government impermissible power to encourage certain church activities and discourage others. The "strictly church duties" taxing standard places the religious content of plaintiffs' schools on trial and inappropriately thrusts the state governments into answering questions of religious doctrine, mission and values. The audits conducted by the State to collect and evaluate information to be used in assessing the tax allegedly due included inquiries regarding the content of instruction, the qualifications of the teachers, and the extent to which teachers are engaged in other than teaching activities. (*See* Plaintiffs' Trial Exhibit 18 and footnote 11, *infra*) The Secretary's witness, Mr. Streett, admitted on cross-examination that the hearing examiners in compensation hearings would make a determination as to whether an employee's duties were religious. (*See* Joint Appendix ("JA") at 177)

Appellants' inquiry into what is and what is not religious is a prohibited establishment of religion. As the Court stated recently in *New York v. Cathedral Academy*, 434 U.S. 125 (1977): "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once." *Id.* at 133. The Court reached the same conclusion in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), where the Court invalidated a solicitation statute

which required a local official to determine whether a cause was a religious cause.

The enforcement of the "strictly church duties" tax standard by the appellants carries the additional danger that the state may prefer one church over another and one religion over another. The activities performed by different churches and different religions are, by nature, not coextensive because different churches of the same religion and different churches of different religions perform activities which are unique to the doctrine of the sect and to the needs of the parish. One church or religion may prefer that its employees operate a school, another a choir and a third may prefer door-to-door solicitation. When the states are required in each instance to make evalulations of what duties constitute strictly church duties and tax the remainder, financial and administrative burdens will be imposed to different degrees, religion to religion, and state to state. The disparate treatment of religious activities engaged in by different churches and different religions smacks of the establishment of religion. If the first amendment means anything, it means that government may not "prefer one religion over another." *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).

In summary, therefore, the Secretary's taxing standard and application of that standard is constitutionally unsound because that standard necessarily requires the state to make religious judgments forbidden by the first amendment.

2. The Benefit Eligibility Determination Process Must Result in Excessive Entanglement.

The tax collection process, however, is not the only entangling incident of the scheme. The State has admitted that teachers are hired by the Synod's churches to teach at the schools on the basis of their ability to pass along to enrolled students, by word and example, church doctrine. (*See* Pre-

Trial Conference Order, p. 15, ¶¶ 22-26) The Lutheran plaintiffs' evidence showed that a teacher is subject to dismissal if he fails to teach, by word or personal example, both inside and outside the classroom, the doctrine and principles of the Synod. (*See* Declaration of William Ray Hampton, p. 152; Declaration of Robert Dueker, p. 176; Plaintiffs' Trial Exhibits 1, 8, admitted into evidence at the trial of this action on August 12, 1980)

The amount of unemployment tax due from an employer is determined by the number of employees who have become eligible for unemployment insurance. The issue "most frequently disputed" in connection with claims for unemployment compensation is the reason for termination of employment. *California Department of Human Resources Development v. Java*, 402 U.S. 121, 126 (1971). This issue is extensively litigated because other states' laws, like California, uniformly provide for denial of benefits to employees who were discharged for "misconduct in connection with their work" or who voluntarily left employment "without good cause".[8] An individual is *presumed* to have been discharged for reasons other than misconduct in connection with his work and not to have left his work voluntarily without good cause. *Id.* (Emphasis supplied.) "Misconduct" has been defined in the applicable case law as limited to "willful, wanton, or equally culpable conduct" and does not include "mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or

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[8]Section 1256 of the *California Unemployment Insurance Code* provides that a person becomes ineligible for unemployment compensation "if the director finds that he left his most recent work voluntarily without good cause or that he has been discharged for misconduct connected with his most recent work."

discretion." *See, e.g., Jefferson v. California Unemployment Insurance Appeals Board*, 59 Cal.App.3d 72, 79 n.3, 130 Cal.Rptr. 405, 410 n.3 (1976).

In cases involving dismissal of a teacher for conduct or teachings at variance with church doctrine, the teacher would have the right to demand that the underlying reason for the unemployment be examined by the state unemployment agency. Federal law requires that the states provide an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. § 503(a)(3). Hearings in such cases would necessarily involve review of religiously motivated employment decisions of church officials, as well as inquiry into matters of church doctrine and practice.

Ernest Carter and Bernard Streett, employees of the United States Department of Labor, both testified that whether an employee has committed misconduct in connection with his work is a prominent issue at such hearings. (JA at 128-30, 178) Mr. Carter testified that "misconduct" occurs if an employee has "willfully violated his contract of hire and committed an act harmful to the employer's interests" (JA at 114); and that the determination of whether an act is harmful to the employer's interests is made by the hearing officer and may vary depending on the nature of the employer's business. (JA at 115-16, 123-24, 126)

Mr. Streett admitted that a contract of hire between an employer and any employee often is neither written nor oral and may contain implied terms. (JA at 131, 173, 179) The implied terms of hire may vary depending on the nature of the employer's business (JA at 179) and would differ from one church to another depending on the doctrine of the church. (JA at 179) The hearing examiner, however, determines what the implied terms of the contract of hire are

(JA at 179) and thus, implicitly, what the doctrine of the church is. The hearing examiner also decides the "reasonableness" of particular implied work rules (JA at 134) as well as whether the rule is enforced zealously. (JA at 146-48) In the event of a disagreement between a church employer and its employee over what constitutes church doctrine, the church must present evidence regarding what the doctrine of the church is. (JA at 134, 186)

Therefore, if the unemployment tax scheme is applied to religious schools, the government will inevitably be required to sit in judgment on whether or not a church employee, discharged because of an inability or failure to transmit church doctrine, is guilty of misconduct, or to sit in judgment of whether or not an employee who leaves voluntarily because of doctrinal differences has left "without good cause."

The same potential for chilling sensitive employment decisions of church authorities that existed in *Catholic Bishop* exists in this case. Church officials will be confronted with a choice of foregoing their right to discharge teachers who do not or cannot transmit church doctrine or of doing so "at the risk of a protracted and expensive unfair labor practice proceeding . . . which would certainly in part involve the Church's religious policies and beliefs." *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1124 (7th Cir. 1977), *aff'd* 440 U.S. 490 (1979).

A comparison of the present case with those in which the Court has found that government aid to sectarian schools did not give rise to sufficient entanglements to offend the first amendment further shows the impermissible nature of the entanglement in the unemployment tax scheme. *Tilton v. Richardson*, 403 U.S. 672 (1971) is the leading case regarding the extent of permissible entanglement. In *Tilton*, the Court upheld an act which provided federal construction

grants to private sectarian colleges. The grants were not to be used for "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . primarily in connection with any part of the program of a school or department of divinity." The Court found three factors which "diminish the extent and the potential danger of the entanglement." *Id.* at 685.

The first factor was the "significant [difference] between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools," which included the fact that religious indoctrination was not a substantial purpose or activity of the colleges involved. Here, the evidence shows that the schools involved in this case are primary and secondary schools which are highly religious in orientation. Second, since the subject of the entanglement in *Tilton* was inanimate, *i.e.*, buildings instead of teachers, less surveillance would be required to ensure that the buildings were not used for a proscribed purpose. In this case, as in *Lemon*, the nature of the inquiries required by the eligibility determinations are inquiries directed to teachers and other church employees not to inanimate objects, and are, therefore, most subjective requiring greater surveillance. Third, the *Tilton* court explained: "There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact." *Id.* at 688. In this case, the entanglement, including audits, assessment proceedings and eligibility determinations, does not occur only once, as in *Tilton*, but rather are ongoing, as in *Lemon*.

The State argues that the Lutheran plaintiffs have shown no potential for excessive entanglement in the state benefit eligibility determination process because no evidence was

presented at the trial as to the method by which eligibility for benefits is determined under California law. Such evidence is unnecessary—the potential for excessive entanglement is amply demonstrated by the argument contained in the State's own brief.

At pages 21-22 of its amended brief, the State asserts:

> In determining whether an employee was discharged for misconduct the important factor is whether such employee failed to abide by an established work rule. Employers such as the appellees herein are of course free to establish any work rules they desire, including rules incorporating religious beliefs. A knowing violation of a work rule constitutes misconduct. The principal inquiry in a benefit eligibility hearing is not whether a given work rule conforms to Church doctrine but only whether the employee knew of the rule and nevertheless violated it. The benefit eligibility hearing could be conducted on a purely *secular* basis. (Footnote omitted. Emphasis in original.)

The above-quoted argument omits the initial inquiry which must be made: What was the "established work rule" which the employee is alleged to have violated? The question must be answered prior to deciding whether the employee knew of the rule and nevertheless violated it.

As the State has noted, the *church* as the employer "would have the burden of *proving what the work rule was* and that the employee knowingly violated it." (State's Amended Brief at p. 24) In determining what work rules, especially what implied work rules, have been "established" by a church, a hearing board will inevitably be called upon to decide what the doctrine of the church is to the extent the doctrine is itself the work rule. The only way to "prove" what a "work rule" is, where the applicable work rules include adherence to the doctrine of a church,

would be to present evidence as to the doctrine. The employee, presumably, would then have the opportunity to *disprove* that the rule allegedly violated was an "established work rule"—*i.e.*, to deny that the church adhered to a particular doctrine.

Although the State assures us that "[o]nce the religious employer demonstrated what was the work rule or church doctrine alleged to have been violated, the State would be bound to give effect to that work rule or church doctrine" (State's Amended Brief at p. 24), this "assurance" ignores the fundamental problem presented: the church must *prove* what its doctrine is.

The State's argument that entanglement will not result because the State is "foreclosed from determining the *truth*" of church doctrine (State's Amended Brief at p. 24) is a "red herring".[9] No one has suggested heretofore that the constitutional problem with the eligibility benefit determination process arises from potential adjudications of whether church doctrine is "true." The constitutional problem derives, rather, from the fact that an administrative agency will be called upon to determine (when the discharged employee denies that the church holds a particular doctrine) whether the church adheres to the doctrine in the first instance.

Furthermore, the State admits at footnote 13 of its amended brief that *the actual reasonableness* of a given "work rule" (*i.e.*, doctrine) is subject to review by the hearing board if it is considered "unreasonable" either "because compliance would impose a new and unreasonable burden on the employee," or "because it does not relate to or affect the employer's business interest." *See* 22 *Cal.*

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[9]The Secretary makes the same argument at pp. 28-29 of his brief.

Adm. Code § 1256-36(b)(1). Therefore, the hearing board has the authority under California law to decide that a particular religious doctrine is sufficiently "unreasonable" to excuse church employees from compliance! In sum, it is apparent that the California benefit eligibility process functions exactly as the federal witnesses testified that the process would function and that the California process is afflicted with the same unconstitutional entanglements.

The State contradicts itself as to the issues to be decided in the benefit eligibility hearing. After proclaiming repeatedly that the employer (church) must prove what the work rule (doctrine) was, the State reverses itself and states that only the employee's "understanding" of the doctrine need be adjudicated. (State's Amended Brief at p. 24)[10] Even if it were true (which it cannot be) that only the employee's conception of church doctrine mattered, constitutional problems are still presented. First, each time the church exercised its right to discharge a teacher whose understanding and

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[10]*Thomas v. Review Board*, 450 U.S. 707, 101 S.Ct. 1425 (1981), cited by the State in this connection, is inapposite. In *Thomas*, the Court overturned an Indiana ruling holding that a Jehovah's Witness who, for religious reasons, voluntarily terminated his employment at a weapons factory, was not entitled to unemployment compensation. The Court held that Thomas could not be compelled to choose between upholding his religious convictions and receiving state benefits. *Id.* at 1432-33. The Court did not hold that Thomas could be compelled to establish, to a hearing board's satisfaction, the requirements of his religion. The issue in *Thomas* was simply "whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion." *Id.* at 1431. In contrast, the issue in a discharge hearing is not what the employer's "honest conviction" might have been as to whether the employee violated an "established work rule." The question is whether the employee in fact *did* violate the work rule so as to be guilty of misconduct. Thus, while in *Thomas* no extensive inquiry into religious beliefs was necessary beyond establishing that the employee actually held a certain belief, in the instant situation the tribunal must decide whether the employer or the employee "more correctly perceived the commands of their common faith." *Id.*

effectuation of church doctrine did not comport with the church's position on the subject, the church would be subject to the unemployment tax. Second, the church would still be forced to prove what the church doctrine actually is, in an effort to prove that the employee could not reasonably have understood it to be anything else.

There is no room for doubt that eligibility hearings will involve the government in determining not only what is or is not church doctrine but also what is "important" or "reasonable" church doctrine. Such hearings would impermissibly intrude upon the "power [of religious institutions] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 722 (1976), quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).

The State cites *United Methodist Council v. Superior Court*, 439 U.S. 1369 (1978), for the proposition that a civil court can determine on a "purely secular basis" whether an employee has "knowingly" violated an "established work rule." (State's Amended Brief at pp. 25-26) That case does not support the proposition of law for which it is cited. In *United Methodist Council* the issue was whether the General Council on Finance and Administration of the United Methodist Church was "doing business" in California so as to subject it to the jurisdiction of California courts. The case came before Mr. Justice Rehnquist alone on a petition for certiorari and a request for a stay. Justice Rehnquist held *inter alia* that a court does not violate the first amendment by deciding what the structure and actual mode of operation of a hierarchical church may be. Deciding how a church is structured, however, is a very different matter from deciding what the doctrine of that church might be. The State quotes from Justice Rehnquist's opinion stat-

ing that entanglement considerations "are not applicable to *purely secular disputes* between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged." (Emphasis supplied.) The quoted language does not suggest that determinations as to doctrinal matters are appropriate. A dispute over whether a teacher has violated church doctrine can hardly be characterized as a "purely secular dispute." Furthermore, neither fraud nor statutory violations would be involved in the benefit eligibility hearing process.

The "church property" cases cited by the State are similarly unsupportive of the State's contentions. *Jones v. Wolf*, 443 U.S. 595 (1979), involved a dispute resulting from a schism over the ownership of church property. Although acknowledging that church property disputes may be decided properly by a civil court applying "neutral principles of law," Justice Blackman, writing for the majority, emphasized that civil courts are absolutely prohibited from considering doctrinal matters. *Id.* at 603.

In *Maryland & Virginia Eldership, etc. v. Church of God, etc.*, 396 U.S. 367 (1970), also cited by the State, the Court upheld a Maryland decision as to the ownership of church property because the lower court reached its decision *without* inquiry into religious doctrine. *Id.* at 367-68. In his concurring opinion, Justice Brennan wrote: "[A] State may adopt any one of various approaches for settling church property disputes *so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.*" *Id.* at 368 (Brennan, J., concurring) (emphasis supplied). Justice Brennan stated that, although a civil court can determine ownership by studying deeds, reverter clauses, and state law, if a local church's constitution were to provide that local church property would

revert to the general church unless the general church had departed from church doctrine, the clause could not be civilly enforced. 396 U.S. at 370.

It was a determination that the general church had "departed from the doctrine" which resulted in the Court's reversal of a Georgia Supreme Court decision in *Presbyterian Church, etc. v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). The case had been submitted to the jury on the premise that state law implied a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice as they existed when the local churches became affiliated. The jury found for the local churches. Reversing the judgment, the Court stated:

> The Georgia courts have violated the command of the First Amendment. The departure-from-doctrine element of the implied trust theory which they applied requires the civil judiciary to determine whether actions of the general church constitute such a "substantial departure" from the tenets of faith and practice existing at the time of the local churches' affiliation that the trust in favor of the general church must be declared to have terminated. This determination has two parts. The civil court must first decide whether the challenged actions of the general church depart substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated. *A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure*

was found. Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role. (*Id.* at 449-50. (Emphasis supplied.))

Just as the Georgia courts were prohibited from deciding whether the Presbyterian Church had "departed from the doctrine," the Employment Development Department is prohibited from ruling on whether an employee discharged by a religious school was discharged for "departing from doctrine."

3. The Mere Potential for Excessive Entanglement Is Sufficient to Offend the Establishment Clause.

The State argues that "concrete proof" that excessive entanglement will occur should be required. Plaintiffs need not show that excessive entanglement will occur to a certainty, nor must they show that excessive entanglement has already occurred.[11] The mere *potential* of excessive entan-

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[11]Nevertheless, the Lutheran plaintiffs have shown that such entanglement has already occurred with respect to the State's tax assessment procedure. The evidence admitted in this case shows the nature of the surveillance, interviews and record keeping which the State has attempted to require. In a letter addressed to the Synod's attorneys from Joseph L. Candelaria, an employee of the State (Plaintiffs' Trial Exhibit 18), the State made the following inquiries regarding the employees of Pilgrim Lutheran Church:

1. What services were performed by each individual?
2. Where were the services performed?
3. If performed for both the school and church, what was the percentage for each?
4. If any licensed, ordained, or commissioned minister(s) are listed above, what procedure is necessary to be licensed?
   a. Requirements
   b. Steps
   c. Time
5. Identify those employees as shown in various steps in (4b).

glement is sufficient to offend the establishment clause. *Meek v. Pittenger*, 421 U.S. 349, 371-72 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 615, 619-20 (1971); *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 76 (1st Cir. 1979); *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1126 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979). In *Catholic Bishop v. NLRB*, the Seventh Circuit stated:

> The whole tenor of the Religion Clauses cases involving state aid to schools is that there does not have to be an actual trial run to determine whether the aid can be segregated, received and retained as to secular activities only but *it is sufficient to strike the aid down that a reasonable likelihood or possibility of entanglement exists*. (559 F.2d at 1126. (Emphasis supplied.))

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6. If number 4 above is applicable:
   a. Does service performed by a minister constitute the conduct of religious worship or the ministration of sacerdotal functions?
   b. Is the service performed pursuant to an assignment or designation by his ecclesiastical superiors?
7. Is lodging furnished to any of the above individuals?

The evidence presented to the District Court shows that the process involved in collecting the unemployment tax and unemployment tax information has caused governmental tax officials to become involved in and concerned with the day-to-day duties performed by those employed to operate plaintiffs' schools and has caused constant surveillance, personal interviews and voluminous record keeping regarding activities performed by those employed to operate the schools. The Lutheran plaintiffs' witnesses testified in their declarations (*See* Declaration of Dorothy E. White, pp. 2-3; Declaration of Ellen Quandt, pp. 4-5; Declaration of Sherryl Delto, pp. 6-7; Declaration of Nathanael P. Lucas, pp. 8-10, admitted into evidence at the trial of this action on August 12, 1980) that Mr. Candelaria had interviewed each of them, some on more than one occasion, with respect to the school operated by Pilgrim Lutheran Church. Other witnesses similarly testified in their declarations that they had been visited by auditors from the State. In each instance, the auditor sought information concerning the content of subjects taught and the qualifications of the teachers as well as financial information concerning the respective churches. (*See* Declaration of Laurita Wesling, p. 15, admitted into evidence at the trial of this action on August 12, 1980; Declaration of Wilma Weyand, p. 21, admitted into evidence at the trial of this action on August 12, 1980)

The burden of proof as to the constitutionality of the employment tax scheme lies with appellants. In *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979), the Roman Catholic President of the Inter-Diocesan Secretariat for Catholic Education of Puerto Rico challenged a regulation of the Department of Consumer Affairs under which that agency sought to collect financial and other information concerning the parochial schools. The regulation was directed toward curbing inflation in the commonwealth. The Court held that inflation control was not a sufficiently "compelling" governmental interest to justify the potential infringement of the plaintiffs' rights and stated:

> [I]n this case we are dealing with the gathering of information in a context where we cannot conceive—nor have we been apprised—of any rational end product use of this information which will not encroach on appellants' First Amendment rights.
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> It is not the obligation of the schools to prove as a precondition for relief at this time that this precise scenario, which hardly can be called speculative, in fact will unfold. To the contrary, in the sensitive area of First Amendment religious freedoms, the burden is upon the state to show that implementation of a regulatory scheme will *not* ultimately infringe upon and entangle it in the affairs of a religion to an extent which the Constitution will not countenance. *In cases of this nature, a court will often be called upon to act in a predictive posture; it may not step aside and await a course of events which promises to raise serious constitutional problems.* (604 F.2d at 75-76. (Emphasis supplied.))

B. The Unemployment Tax Scheme Violates the Free-Exercise Clause of the First Amendment.

The approach taken by the Court in "free exercise" cases is illustrated by *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, the Court overturned a South Carolina decision

in which a member of the Seventh-Day Adventist Church was discharged and denied unemployment benefits because she refused, owing to a religious belief, to work on Saturday. In describing the appropriate constitutional approach, the Court stated:

> If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . ." (*Id.* at 403. Cits. omitted.))

Later, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court, in invalidating a Wisconsin compulsory school attendance law, described the approach as follows:

> [I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. (*Id.* at 214.)

The uncontradicted evidence in this case showed that the operation of schools by the Synod's churches is "rooted in religious belief" and is an integral part of their religious mission. The Court has repeatedly recognized the primarily religious purpose underlying the operation of church-affiliated elementary and secondary schools. *See NLRB v. Catholic Bishop*, 440 U.S. 490, 503 (1979); *Meek v. Pittenger*, 421 U.S. 349, 365-66 (1975) (church schools have "predominately religious role"); *Lemon v. Kurtzman*, 403

U.S. 602, 628 (1971) (Douglas, J., concurring) ("the *raison d'etre* of parochial schools is the propagation of a religious faith"). The commentators have agreed that parochial school education is a protected "exercise of religion": "That parochial school education constitutes the practice of a legitimate religious belief has seldom been questioned. . . . In other words, the parochial schools are sufficiently religious to meet a constitutional test for a legitimate free exercise claim." Note, "The Free Exercise Clause, the NLRA and Parochial School Teachers," 126 *U. Pa. L. Rev.* 631, 641-42 (1978).

Applying the principles previously articulated by the Court to this case leads to the inescapable conclusion that the application of the unemployment tax scheme to individuals employed by churches to operate schools is unconstitutional. Application of the unemployment tax scheme would interfere with the Lutheran plaintiffs' operation of the schools and with their free exercise of religion in that it would: (i) interfere with the right of the churches to employ individuals to operate the schools who satisfactorily communicate the doctrine of the Synod and to discharge those who do not; (ii) interfere with the right of the churches to assign their employees to activities in furtherance of their religious mission; and (iii) impose an administrative and tax cost burden on the operation of an integral part of the religious mission of the Synod and its member churches. Furthermore, there is no compelling state interest sufficient to override the burden imposed by the unemployment tax scheme on the free exercise of religion.

1. Application of the Unemployment Tax Scheme Would Interfere With the Right of the Churches to Employ Individuals Who Satisfactorily Communicate Church Doctrine.

As set forth above, state laws uniformly provide that an individual is ineligible for unemployment benefits if he has been discharged for "misconduct" in connection with his

work. Unless an employee quits voluntarily "without cause" or is discharged for "misconduct", the employer is liable for the unemployment tax.[12] *See Cal. Unemployment Ins. Code* § 1256. "Misconduct" does not encompass "mere inefficiency, unsatisfactory conduct, [or] failure in good performance as the result of inability or incapacity." *Jefferson v. California Unemployment Insurance Appeals Board*, 59 Cal.App.3d 72, 79 n.3, 130 Cal.Rptr. 405, 410 n.3 (1976). Both Mr. Carter (JA at 136) and Mr. Streett (JA at 187) testified that incompetence does not constitute "misconduct".

Therefore since the tax is computed according to the number of an employer's employees who have become eligible for unemployment compensation, application of the unemployment tax scheme would inhibit the schools from: replacing graduates of other colleges with graduates of colleges operated by the Synod; replacing teachers who are not members of the Synod with those who are; replacing teachers who are not members of the church with those who are; or replacing teachers who do not or cannot satisfactorily communicate the doctrine of the Synod. For each of these decisions, the church school would be required to pay additional unemployment tax.

2. Application of the Unemployment Tax Scheme Would Interfere With the Right of the Churches to Assign Their Employees to Activities in Furtherance of Their Religious Mission.

The Secretary's interpretation is that only persons performing "strictly church duties" are exempt from coverage. (*See* Plaintiffs' Trial Exhibit 33 and footnote 7, *supra*) Per-

[12]Two methods of financing the unemployment tax are available to those nonprofit employers required to pay the tax. The "reimbursement method," available only to nonprofit employers by election, allows the employer to pay tax only after and in an amount equal to benefits paid. *Cal. Unemployment Ins. Code* §§ 801 *et seq.* The "tax rate" method requires regular contributions according to tax schedules. One factor in the schedules is the employer's experience for prior years. *Cal. Unemployment Ins. Code* §§ 901 *et seq.*

sons employed by the churches routinely perform both what the Secretary has deemed to be "strictly church duties" and what he has deemed to be not "strictly church duties." Section 3306(d) of the *Internal Revenue Code* provides:

> [I]f the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment.[13]

In order to avoid the unemployment insurance tax with respect to particular employees, the churches will have to exercise care to see that a "strictly church duties" employee does not spend too much time on what *the government does not consider to be* "strictly church duties"; and will be encouraged to see that all employees spend more time doing "strictly church duties." In addition to the obvious tendency to encourage certain exercises of religion and discourage others, such a standard interferes with the church's decisions with respect to the allocation of personnel according to what it believes to be in furtherance of its religious mission.

This burden becomes all the greater when combined with the requirement that a determination of whether services of any employee are employment within the meaning of the unemployment insurance acts must be made for *each* pay period of each employee. *See, e.g., Reliable Life Insurance Co. v. United States*, 356 F.Supp. 235, 238-39 (E.D. Mo. 1973).

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[13]The California equivalent is Section 607 of the *California Unemployment Insurance Code*.

3. Application of the Unemployment Tax Scheme Would Impose an Administrative and Tax Burden Upon the Operation of an Integral Part of the Religious Mission of the Synod and Its Member Churches.

In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), cited by the State in support of its argument, the Court held that a license tax upon the exercise of religious activities is unconstitutional on its face as a direct restriction of the free exercise of freedoms which are protected by the first amendment. In that case, a Pennsylvania ordinance required all persons canvassing or soliciting orders for goods or merchandise of any kind to pay a fee and to procure a license to transact such business. Petitioners were Jehovah's Witnesses who went from door to door distributing literature and soliciting people to purchase certain religious books and pamphlets. In determining that the ordinance was unconstitutional as applied to the Jehovah's Witnesses, the Court reasoned that a tax upon a religious activity is different from tax upon income and property of religious institutions and employees who operate such institutions. The latter taxes are, in some instances, valid while the former is not. A tax upon a religious activity is prohibited because it (1) confers power on government to control or suppress a particular activity by requiring the individual to purchase the enjoyment of the activity which is protected by the Constitution; and (2) acts as a prior restraint to censor the activity at the outset. Since the nature of the tax was dangerous in itself, it was unnecessary to prove that the tax did *in fact* suppress or control the religious activity in question. *Id.* at 112-14.

The decision in *Murdock* was reinforced with *Follett v. McCormick*, 321 U.S. 573 (1944), which the State has also cited. In *Follett*, the Court held that a municipal ordinance which imposed a license tax on books was unconstitutional as violative of the free-exercise clause of the first amend-

ment as applied to an evangelist who distributed religious literature in his home town and made his livelihood from such activity. The Court relied extensively upon the analysis developed in *Murdock* and elaborated:

> The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious (*Grosjean v. American Presso Co., and Murdock v. Pennsylvania, supra*) as the imposition of a censorship or a previous restraint. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357. For, to repeat, "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment."
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> This does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the *Murdock* case. [Cit. omitted.] But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege. (321 U.S. at 577-78.)

The analysis applied by the Court in *Murdock* and *Follett* to declare license taxes upon religious activities unconstitutional is applicable here. Like the tax imposed in *Murdock* and *Follett*, the unemployment tax in this case is a direct financial restraint upon the Lutheran plaintiffs' right to engage in religious activities which are protected by the Constitution. The unemployment tax scheme directly restrains these activities in at least two respects: First, if incompetence or inability to teach church doctrine is not "misconduct," requiring the Lutheran plaintiffs to pay the tax is the equivalent of requiring the churches either to purchase from the

State the right to preserve church doctrines through the employment of individuals who satisfactorily communicate that doctrine, or to continue to employ teachers who do not satisfactorily communicate the doctrine. Second, to require the churches to pay the tax would infringe upon decisions of those churches regarding the assignment of duties to employees. The churches may purchase from the government the right to assign duties, in furtherance of their religious mission, which are, in the view of the government not "strictly church duties" or they may assign duties to minimize payment of the tax.

The State argues that the Lutheran plaintiffs have not shown sufficient "interference" with their exercise of religion. In making this argument, the State apparently assumes that financial burden can never provide the requisite "interference" and has failed to address the precise nature of the injury and interference alleged by plaintiffs. The State has cited *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961), for the proposition that to the extent that the Lutheran plaintiffs are claiming that the unemployment tax constitutes a financial burden, no free exercise claim can be made merely because the imposition of the unemployment tax scheme would render the practice of religion more expensive.[14] In the first place, *Braunfeld* does not stand for the proposition advanced by the State, and in the second place, the Lutheran plaintiffs have not based their interference argument on either a "mere increase in expense" or on a contention that no tax can be applied to religious activities.

The plaintiffs in *Braunfeld* were Orthodox Jews who challenged a Pennsylvania Sunday closing law, contending that because their day of rest was Saturday, the inability to open their business on Sunday worked an economic hardship and

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[14]The Secretary makes the same argument at pp. 34-35 of his brief.

thus, made the exercise of their religion more expensive. The Court did not hold that the financial impact was not an interference with the plaintiffs' practice of religion, but rather that the governmental interest was sufficiently compelling to justify the incidental burden on the exercise of religion. In fact, the Court has previously stated that the taxing power may be used so as to infringe upon the free exercise of religion. *Flast v. Cohen*, 392 U.S. 83, 104 n.25 (1968).

The principal distinction between *Follett* and *Murdock*, where taxes on religious activity were stricken, and the cases cited by the State, is the nature of the religious activity affected by the tax. In *Follett* and *Murdock*, as in the present case, the affected activity was the dissemination of the doctrine of the religion and thus, the functional equivalent of preaching.[15] In *Follett* and *Murdock*, the method of communicating the doctrine of the religions was door-to-door sales of literature and the impermissible tax was a license tax on door-to-door salesmen. In the case of schools operated by churches, the method chosen to communicate the religious doctrine is a school and the tax is imposed because of the Synod's choice to communicate its doctrine through classroom teachers who are capable of communicating the doctrine.

4. No Compelling State Interest Has Been Shown.

The State insinuates that any time a statute is passed by a state or the federal government for the promotion of the health, safety, and general welfare, the benevolent purpose

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[15]Thus, in *Murdock* the Court stated: "The Supreme Court of Iowa . . . described the selling activities of members of this same sect as 'merely incidental and collateral' to their 'main object which was to preach and publish the doctrines of their order.' [Cits. omitted.] That accurately summarizes the present record." 319 U.S. at 112.

behind the statute is sufficient to excuse any burden it may impress upon the free exercise of religion. (*See* State's Amended Brief at p. 29) It is not. Once it is determined that a regulation imposes a burden on the free exercise of religion, as is the case here, the regulation can be upheld only if the government is able to show a "compelling state interest." *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 406 (1963) ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.' "). The Court in *Sherbert* explained what was required by way of a compelling state interest:

> [T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." [Cits. omitted.] *The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.* (*Id.* at 402-03. (Emphasis supplied.))

Furthermore, the government *must* show that it has chosen the least restrictive alternative—that it can reach the alleged evil by no other device. *Thomas v. Review Board*, 450 U.S. 707, 101 S.Ct. 1425, 1432 (1981).

The record is entirely devoid of any showing whatsoever that any compelling governmental interest requires unemployment tax coverage of persons employed by churches to operate schools. There is not one shred of evidence with respect to rampant unemployment, poverty or social hardship of any kind among this group, much less any "threat to public safety, peace or order." Likewise, there is no

assertion, nor any evidence, that the governmental objective cannot be accomplished by a less restrictive alternative.

Some very important state interests have not risen to the necessary "substantial threat to public safety, peace or order" standard. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (discouragement of illicit sexual conduct, ensuring safety of medical procedures, and protection of pre-natal life); *Wisconsin v. Yoder*, 406 U.S. 205, 221-29 (1972) (compulsory education); *State v. Whisner*, 47 Ohio St. 2d 181, 351 N.E. 2d 750 (1976) (minimum standards for schools). Here, no compelling governmental interest exists. There is no "substantial threat to public safety, peace or order" posed by exempting all church employees from unemployment or disability insurance coverage. Indeed, they were so exempted without damage to public safety, peace, or order until the Secretary's ruling in April 1978.[16]

C. 28 U.S.C. Section 1341 Does Not Bar the Relief Granted in This Case.

The Secretary has asserted that this action should have been dismissed pursuant to the terms of the Tax Injunction Act, 28 U.S.C. Section 1341. That statute provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." By its terms Section 1341 relates only to injunctions against the state and state taxes. The

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[16]Although, as the State notes at p. 19 of its amended brief, parochial school employees were covered under the temporary Special Unemployment Assistance Program, P. L. 93-567, 88 Stat. 1850 ("SUA"), "[b]ecause such non-profit schools were not subjected to any tax liability under the SUA program, there was no occasion to consider constitutional implications of the legislation." (Recommended Decision of Administrative Law Judge in Alabama-Nevada Conformity Proceeding, Plaintiffs' Trial Exhibit 41 at p. 4)

exception to Section 1341, where no "plain, speedy and efficient remedy may be had in the courts of such state" is applicable here and allows this Court to adjudicate this entire controversy and grant both declaratory and injunctive relief as to the State. *See Independent Baptist Church v. Tennessee*, 468 F.Supp. 71 (E.D. Tenn. 1978).

The Lutheran plaintiffs brought this action in state court. The Secretary removed the action to the District Court. The state court remedy available to the Lutheran plaintiffs is inadequate first because the Lutheran plaintiffs cannot force the Secretary to stand suit in state court. In *United States Steel Corp. v. Multistate Tax Commission*, 367 F.Supp. 107 (S.D.N.Y. 1973), the court denied defendants' motion to dismiss brought pursuant to Section 1341. One basis for the court's denial of the motion was that the plaintiffs could not obtain jurisdiction over all proper parties in the state courts: "In a situation where plaintiffs may not be able to obtain jurisdiction over the proper parties, the state declaratory judgment remedy can hardly be said to be adequate." *Id.* at 116.

Furthermore, the state remedy suggested by the Secretary is an action for refund brought after the disputed tax is paid. Such a procedure would have required at least 104 separate actions in the state court against the State as well as an action in the federal court against the Secretary for the Lutheran churches alone. In *United States Steel Corp.*, 367 F.Supp. 107 (S.D.N.Y. 1973), the court held that:

> The necessity for such a multiplicity of actions cannot by any stretch of the imagination be considered a viable alternative to federal suit, but rather, falls into that category of state remedies which are considered "unduly burdensome". Georgia R. R. & Banking Co. v. Redwine, *supra*, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335.

This interpretation of the statute is supported by the case of Matthews v. Rodgers, 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447 (1932), cited by defendants. The Court in *Matthews* refused to grant plaintiff taxpayers an injunction against a state taxing authority where they had an adequate remedy under state law by paying the tax and suing for a refund. In particular, the Court held that the state remedy was adequate *precisely because* each taxpayer would only have to bring one suit to vindicate his rights as a taxpayer. The Court indicated, however, that federal equity jurisdiction would obtain if plaintiffs would have had to bring numerous suits to vindicate their rights:

> "In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties, involving the same issues of law and fact." *Id.* at 529-530, 52 S.Ct. at 221.

Cases decided after the passage of the present version of § 1341 have sustained federal jurisdiction where the alternative state remedy involved a multiplicity of suits. *See Georgia R.R. & Banking Co. v. Redwine, supra,* 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335; Louisville & Nashville R. R. v. Public Service Commission, 249 F.Supp. 894 (M.D. Tenn. 1966), aff'd, 389 F.2d 247 (7th Cir. 1968). (367 F.Supp. at 115-16)

In refusing to grant defendants' motion to dismiss pursuant to Section 1341, the court stated the law with respect to uncertain state remedies: "Where . . . the adequacy of the state court remedy is uncertain, there is no 'plain' state remedy and the federal court can exercise jurisdiction under § 1341." *Id.* at 117. In this case, the state remedies are uncertain not only because of the unavailability of the Secretary and the multiplicity of suits but also because of the

existence of Section 1851 of the *California Unemployment Insurance Code* which prohibits generally the use of equitable relief to prevent the collection of contributions for unemployment or disability insurance.[17]

Moreover, the very process of collecting the unemployment and disability insurance taxes deprives the Lutheran plaintiffs of a personal liberty. In *Gray v. Morgan*, 371 F.2d 172 (7th Cir. 1966), *cert. denied*, 386 U.S. 1033 (1967), the Seventh Circuit considered the issue of whether an alleged constitutional violation created an exception to the Tax Injunction Act. The court stated: "In the instant case, we have no claim of the denial of procedural due process. Plaintiffs do not complain of the method of assessing or collecting the tax. They complain of the tax itself." 371 F.2d at 175. The Lutheran plaintiffs do complain that the methods of assessing and collecting the taxes in question infringe the personal liberties guaranteed to them by the first amendment.

Because of the reasons set forth above with respect to ability to obtain jurisdiction over proper parties in one action, and because of the multiplicity of actions which would result and the uncertainty of state court relief, if Section 1341 were to act as a bar to the Lutheran plaintiffs' assertion of their first amendment rights before the District Court, that section would be unconstitutional.

The Court has previously held that where a statute passed pursuant to an otherwise valid congressional power, inter-

---

[17]That section provides:

No injunction against collection

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin the collection of any contribution sought to be collected under this division. *Cal. Unemployment Insurance Code* § 1851.

feres with first amendment rights, the interests protected by the statute must survive a test of "exacting scrutiny". *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). ("This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 64-65.) In such an instance, government regulation of conduct is justified only if the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of [first amendment] freedoms." 424 U.S. at 25.

In this controversy, there is no interest served in denying jurisdiction based upon Section 1341. If the Court holds that the District Court did not have jurisdiction of this controversy, the Lutheran plaintiffs will be hindered in the vindication of their first amendment rights. It is a constitutional imperative that the Lutheran plaintiffs have reasonable access to the courts to vindicate their constitutional rights. *White v. Ragen*, 324 U.S. 760 (1945); *Hooks v. Wainwright*, 352 F.Supp. 163, 166 (M.D. Fla. 1972); *Gilmore v. Lynch*, 319 F.Supp. 105, 109 (N.D. Cal. 1970), *aff'd*, 404 U.S. 15 (1971); *Konigsberg v. Ciccone*, 285 F.Supp. 585, 596-97 n.5 (W.D. Mo. 1968), *aff'd*, 417 F.2d 161 (9th Cir. 1969), *cert. denied*, 397 U.S. 963 (1970), citing *Ex parte Hull*, 312 U.S. 546 (1941); *DeWitt v. Pail*, 366 F.2d 682 (9th Cir. 1966). Therefore, the Court should hold that the District Court had jurisdiction over the suit out of which this appeal arises.

III.
CONCLUSION.

For the foregoing reasons, the Lutheran plaintiffs respectfully urge the Court to dismiss the appeal herein and to affirm the judgment of the District Court.

Respectfully submitted,

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Nos. 81-31, 81-228 and 81-455

In the Supreme Court of the United States

OCTOBER TERM, 1981

CALIFORNIA, ET AL., APPELLANTS

v.

GRACE BRETHREN CHURCH, ET AL.

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GRACE BRETHREN CHURCH, ET AL., CROSS-APPELLANTS

v.

UNITED STATES, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over this appeal.

2. Whether the Tax Injunction Act deprived the district court of jurisdiction over this action.

3. Whether the requirement of the Federal Unemployment Tax Act (26 U.S.C. 3309(b)(1)) that participating state unemployment compensation programs cover employees of elementary and secondary schools that have a religious orientation, but are not controlled by a church or convention or association of churches, is constitutional.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-31

CALIFORNIA, ET AL., APPELLANTS

v.

GRACE BRETHREN CHURCH, ET AL.

No. 81-228

UNITED STATES, ET AL., APPELLANTS

v.

GRACE BRETHREN CHURCH, ET AL.

No. 81-455

GRACE BRETHREN CHURCH, ET AL., CROSS-APPELLANTS

v.

UNITED STATES, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court holding the Federal Unemployment Tax Act unconstitutional (J.S.

App. 38a-86a) is unreported.[1] The original (J.S. App. 1a-22a) and supplemental (J.S. App. 25a-34a) opinions of the district court at the preliminary injunction stage are likewise unreported.

JURISDICTION

The judgment of the district court was entered on April 6, 1981 (J.S. App. 87a-90a). The federal parties filed a notice of appeal to this Court on April 29, 1981 (J.S. App. 91a-92a). On June 19, 1981, Justice Rehnquist extended the time in which to docket an appeal to and including August 3, 1981 (J.S. App. 93a), and the appeal was docketed on that date. On November 2, 1981, the Court postponed further consideration of its jurisdiction to the hearing of the case on the merits. The jurisdiction of this Court rests on 28 U.S.C. 1252. See pages 13-15, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

26 U.S.C. 3309(b) provides in pertinent part:

> This section shall not apply to service performed—
>
> (1) in the employ of (A) a church or convention or association of churches, or (B)

---

[1] Unless otherwise indicated, references to the "J.S." and "J.S. App." are to the government's jurisdictional statement and appendix filed in No. 81-228.

> an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

28 U.S.C. 1252 provides in pertinent part:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

28 U.S.C. 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Cal. Unemp. Ins. Code § 634.5 (West Supp. 1980) provides in pertinent part:

> With respect to * * * any nonprofit organization described by Section 608, "employment" does not include * * * service performed in any of the following:
>
> (a) In the employ of (1) a church or convention or association of churches or (2) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

STATEMENT

1. The Federal Unemployment Tax Act (FUTA), originally enacted as Title IX of the Social Security

Act of 1935, ch. 531, 49 Stat. 639 *et seq.*, authorizes a cooperative federal-state program to provide benefits to unemployed workers. In general, FUTA imposes an excise tax on wages paid by employers in covered employment, but allows the employer a credit of up to 90% of the federal tax for contributions paid to a state fund established under a federally approved state unemployment compensation law. 26 U.S.C. (& Supp. III) 3301, 3302, 3306; *St. Martin Evangelical Lutheran Church* v. *South Dakota*, No. 80-120 (May 26, 1981), slip op. 2 n.3. The Secretary of Labor annually reviews each state plan, and certifies those plans that comply with the standards established by 26 U.S.C. (& Supp. III) 3304 and 3309.[2]

These standards include minimum coverage requirements. Until 1970, FUTA broadly excluded from the definition of covered employment "service performed in the employ of a religious, charitable, educational, or other [income tax exempt] organization." Pub. L. No. 86-778, Section 533, 74 Stat. 984. In 1970, the required scope of qualifying state plans was expanded, to cover employees of nonprofit organizations, state hospitals, and institutions of higher education. Employment Security Amendments of 1970, Pub. L. No. 91-373, Section 104(b)(1), 84 Stat. 697, 26 U.S.C. (1970 ed.) 3309(a). The religious and educational exemption was narrowed to exclude only service performed (26 U.S.C. (1970 ed.) 3309(b)):

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[2] The certification of compliance with the federal standards means not only that employers in the state are entitled to the tax credit, but also that the state is authorized to receive a grant of federal funds for the administration of the state program (29 U.S.C. 49d; 42 U.S.C. 501).

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education * * *.

In 1976, Congress again amended FUTA, eliminating subsection (3) above. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, Section 115, 90 Stat. 2670. In order to maintain their compliance with FUTA, the states promptly enacted conforming amendments to their unemployment acts. See, *e.g.*, *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*, slip op. 5 n.8; J.S. App. 3a. The parallel California statutory provision is Cal. Unemp. Ins. Code § 634.5 (West. Supp. 1980).

Neither the 1970 nor the 1976 FUTA Amendments imposed the federal excise tax on nonprofit organizations, since service performed for such organizations remains exempt from the definition of "employment" for FUTA tax purposes (26 U.S.C. (& 1970 ed.) 3306(c)(8)). Qualifying state plans, however, must not only cover employees of such organizations, but also must give the organizations the option of either making regular payments to the state unemployment fund or reimbursing the fund for benefits paid out to the organization's employees (26 U.S.C. 3304(a)(6)(B), 3309(a)(2)).[3]

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[3] The conforming California statutory provisions are Cal. Unemp. Ins. Code § 801 *et seq.*, § 901 *et seq.*, § 976 *et seq.* (West 1972 & Supp. 1980).

The Secretary of Labor had interpreted the 1976 Amendments to require state unemployment insurance coverage of employees of church run and church related schools. Under the Secretary's interpretation, the only services exempt from coverage under the amended 26 U.S.C. 3309(b) were " 'those strictly church duties performed by church employees pursuant to their religious responsibilities within the schools.' " *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*, slip op. 5.

2. This litigation was initiated by a number of California churches and religiously oriented schools to enjoin the federal defendants from conditioning federal approval of the state plan on their coverage, and to enjoin the state defendants from collecting information from them on which to base coverage of their employees and from collecting the state tax (J.A. 12, 23-26).[4] Plaintiffs contended that all the private schools they represented were exempt from coverage under the terms of Section 3309(b) of FUTA and its "mirror image" (J.S. App. 56a), Cal. Unemp. Ins. Code § 634.5(a) (West Supp. 1980). Alterna-

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[4] Two separate suits were filed: one by Grace Brethren Church, et al. (case No. CV 79-93 MRP) and the other by The Lutheran Church Missouri Synod (case No. CV 79-162 MRP). The cases were consolidated in the district court.

The district court recognized (J.S. App. 25a-29a) that the plaintiffs represented schools of three distinct kinds: private schools that are part of the corporate structure of a church (Category I schools), private schools that are separate corporations formed by a church or convention or association of churches (Category II schools) and religiously oriented schools not affiliated with any particular church or convention or association of churches (Category III schools). For ease of reference, we will use these categories throughout this brief.

tively, they argued that if the statutes did cover them, they violated the religion clauses of the First Amendment and the equal protection component of the Fifth Amendment (and the Fourteenth Amendment making those clauses applicable to the states).

The district court rejected the federal government's argument that the Tax Injunction Act, 28 U.S.C. 1341, barred the court from granting the relief requested (J.S. App. 16a-21a). On the merits, it concluded that Category I and Category II schools (see note 4, *supra*) were exempt from coverage under the terms of FUTA and Cal. Unemp. Ins. Code § 634.5(a) (West Supp. 1980) (J.S. App. 9a-10a, 41a), and that although Category III schools were not exempt under the statutory language (J.S. App. 41a-54a), benefit entitlement decisions for employees of such schools posed such a risk of excessive governmental entanglement with religion that coverage of such schools violated the Establishment Clause of the First Amendment (J.S. App. 66a-76a).[5] The district court accordingly permanently enjoined the federal defendants from requiring that state unemployment compensation plans cover Category I and II schools as a condition of federal certification, and the state defendants from "collecting, or attempting to collect, unemployment compensation or disability taxes" from Category I, II, or III schools (J.S. App. 89a-90a).[6]

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[5] The district court rejected the alternative constitutional argument that the coverage of Category III schools violates the Free Exercise Clause of the First Amendment (J.S. App. 56a-66a), and found it unnecessary to reach the Equal Protection Clause claim (J.S. App. 76a).

[6] The district court explained (J.S. App. 86a n.39) that it was not entering an injunction against the federal defendants with regard to Category III schools because it had "no infor-

3. Shortly after this injunction was entered this Court announced its decision in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*, holding that schools that have no legal identity separate from a church (Category I schools) are exempt from the federal-state unemployment compensation system under 26 U.S.C. 3309(b)(1)(A). Although there were no Category II or III schools before the Court in *St. Martin Evangelical Lutheran Church*, the Court noted (slip op. 10 n.12) that:

> To establish exemption from FUTA, a separately incorporated church school (or other organization) must satisfy the requirements of § 3309 (b)(1)(B): (1) that the organization "is operated, supervised, controlled, or principally supported by a church or convention or association of churches."

In light of this Court's decision in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*, the district court's conclusion that FUTA does not require coverage of Category I schools is clearly correct. After careful consideration of the relevant legislation, the Secretary of Labor concluded that Congress intended to treat Category I and Category II schools alike, so we have not challenged in this Court the conclusion that Category II schools are also exempt under the statutory scheme. For that reason,

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mation indicating what response, if any, the Secretary will make" to the court's finding concerning them. The court warned, however, that "[i]f the Secretary, in response to failure by the state defendants to collect unemployment compensation taxes on behalf of Category III employees, institutes decertification proceedings against the State of California, the parties may apply to this Court for further relief" (*ibid.*).

the federal appellants did not appeal from the decision in the *Lutheran Church* case, which involves only Category I and Category II schools (see note 4, *supra;* J.S. 6 n.5).

The federal appeal thus relates only to the status of the four independent fundamentalist schools incorporated as the Redwood Christian Schools and the eight such schools incorporated as the Christian Unified Schools of San Diego, who are parties in the *Grace Brethren* case (J.S. App. 28a-29a, 40a n.4).[7] As the district court explained (J.S. App. 49a n.17):

> The independent fundamentalist schools are * * * nondenominational. Though the schools were formed and are operated predominantly for evangelical purposes, and though chapel services are conducted in the schools, the teachers and administrators of the schools are neither ordained ministers nor committed to any particular Christian denomination as a matter of school policy. Indeed, at trial, an administrator of plaintiff Redwood Christian Schools testified that formal denominational affiliation was avoided in order to broaden the appeal of the schools to parents and students of different denominations.

SUMMARY OF ARGUMENT

This Court has jurisdiction of this appeal under 28 U.S. 1252. The district court's injunction against the enforcement of the provisions of the California Unemployment Code is based on its conclusion that

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[7] In their motion to affirm in No. 81-31 (at 4), appellees state that the Christian Unified Schools of San Diego are Category II schools. Cf. 81-228 Motion to Affirm 5, 12. This Court need not resolve this essentially factual issue; it is undisputed that the Redwood Christian Schools are Category III schools.

the identical federal provision is unconstitutional, and its opinion leaves no doubt that, if the federal parties attempt to enforce the federal statute, they will also be enjoined. Section 1252 permits a direct appeal to this Court "however the question of constitutionality may arise, provided the United States is or has become a party and the decision is against the validity of the Act" (*International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304 U.S. 243, 249 (1938)). This is such a case.

The district court should have dismissed the complaint pursuant to the Tax Injunction Act, 28 U.S.C. 1341, which prohibits a district court from restraining the assessment or collection of a state tax where there is a "plain, speedy and efficient remedy" in the state courts. Appellees' assertion that their state remedies are not "plain, speedy and efficient" because their objections are to the procedures by which the tax is assessed, not simply to the payment of the tax, ignores the teaching of this Court in *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503 (1981), that the exception to the Tax Injunction Act does not apply when the state remedies permit a full hearing in which appellees may raise all their constitutional objections to the Act and obtain a judicial determination of its validity. In any event, appellees' argument is based on "a general distrust of the capacity of the state courts to render correct decisions on constitutional issues" (*Allen* v. *McCurry*, 449 U.S. 90, 105 (1980)), a distrust repeatedly condemned by this Court.

Because the district court failed to comply with the Tax Injunction Act, its decision has cast a cloud on the implementation not only of the California Unemployment Insurance Act, but also the unemploy-

ment insurance acts of many other states with similar provisions, and has threatened the efficient administration of the federal-state unemployment insurance system. Accordingly, we submit that it is appropriate for this Court to reject the district court's constitutional conclusions on the merits, thus removing that cloud.

Because FUTA does not aid religion and is not a step toward the establishment of religion, it does not violate the Establishment Clause of the First Amendment. Moreover, FUTA does not foster excessive governmental entanglement with religion. The only duty imposed on Category III schools under FUTA is to keep certain employment records, which are considerably less extensive than other recordkeeping requirements that this Court has held not to constitute excessive entanglement.

Appellees' assertion that FUTA creates unconstitutional entanglement is based upon certain alleged consequences of FUTA coverage that, in fact, would not occur. Because all Category III school employees are covered by FUTA, no inquiry need be made into the religious nature of an employee's service. By the same token, a hearing on an employee's eligibility for benefits would not result in entanglement, even if the employee had been dismissed on the ground of teaching false doctrine. An eligibility hearing would determine only whether an employee is entitled to benefits; no determination of church doctrine would be made. Indeed, although some inquiry into religious matters for the purposes of resolving secular issues does not violate the First Amendment (see *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646 (1980)), even an inquiry into church doctrine would almost never be necessary. A

Category III school is free to establish work rules of its choice and an employee may be discharged for violating them; the question whether those work rules or their application correctly reflect church doctrine is irrelevant to the eligibility hearing. Accordingly, FUTA creates only a very minimal degree of church-state involvement, which does not approach the level of an Establishment Clause violation.

Because the minimal entanglement involved here in no way hinders appellees' exercise of their religion, it does not violate the Free Exercise Clause. Although FUTA imposes no tax liability on Category III schools, it does create the possibility of a limited financial obligation of a school if one of its employees collects unemployment benefits. It is well settled, however, that a statute does not violate the Free Exercise Clause merely because it imposes a nondiscriminatory expense on the practice of religion. The important governmental interest in providing unemployment protection that is advanced by FUTA justifies the minimal entanglement and limited financial obligations that may result from its extension to Category III schools. The application of FUTA in a religiously neutral fashion to employees of Category III schools does not violate the First Amendment.

Finally, the application of FUTA to Category III schools, but not to Category I or II schools, establishes no arbitrary or capricious classification violative of the Fifth or Fourteenth Amendments. Instead, it is rational for coverage determinations to turn on the objective, easily provable question whether a school is controlled by a particular religious denomination, rather than requiring the state to make constitutionally sensitive determinations concerning whether a school is sufficiently "religiously oriented" to be exempt

from coverage. Moreover, it is reasonable to conclude that employees of denominational schools are more likely than employees of non-denominational schools to have access to church programs to ease the economic hardships of unemployment, and to fear that coverage of schools affiliated with a particular denomination poses a greater risk of church-state entanglement than coverage of schools independent of any particular church organization.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS APPEAL

Although appellees have not questioned this Court's jurisdiction over this direct appeal, the Court postponed consideration of this question to the hearing of the case on the merits. While we contend (pages 15-20, *infra*) that the Tax Injunction Act (28 U.S.C. 1341) deprived the district court of jurisdiction over this case, it is clear that this Court's jurisdiction under 28 U.S.C. 1252 "in no way depends on" the jurisdiction of the district court. *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975); accord, *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975). Thus, in *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974), this Court had jurisdiction on direct appeal to conclude that a district court was without jurisdiction to enjoin the collection of a federal tax under the Anti-Injunction Act, 26 U.S.C. 7421, which parallels the Tax Injunction Act.

This Court's jurisdiction under 28 U.S.C. 1252 depends on four conditions: 1) the judgment must be rendered by, *inter alia*, a "court of the United States" (see 28 U.S.C. 451); 2) an Act of Congress must be held unconstitutional; 3) the judgment must be

rendered in a civil proceeding; and 4) the United States or an agency, officer or employee thereof must be a party. 12 *Moore's Federal Practice* ¶ 411.11 (2d ed. 1981). The only condition about which there can be any question in this case is the second. But although the district court's judgment concerning the Category III schools (J.S. App. 89a) in terms applies only to Cal. Unemp. Ins. Code § 634.5(a) (West Supp. 1980),[8] the decision makes clear the court's holding that the federal statute cannot constitutionally be implemented by the Secretary of Labor, and that any effort to do so will be met by an immediate injunction without further consideration of the merits (J.S. App. 86a n.39). As this Court noted in *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31, the purpose of 28 U.S.C. 1252 is "to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality." This is such a case.

In any event, the terms of the federal and the state statutes are identical, and, indeed, the state statute simply reflects the federal requirements in order to avoid "decertification of its program and the substantial hardship to California employers and employees which would result from termination of its FUTA benefits" (J.S. App. 6a). The district court recognized the primacy of the federal statute by focusing in its opinion on that Act and the Secretary's interpretation of it (see, *e.g.*, J.S. App. 9a-14a, 38a-39a, 41a-54a). In light of this particular statutory scheme, the district court's conclusion that the federal statute was unconstitutional was at least one ground for its judgment, which is sufficient un-

[8] Cf. *Williams* v. *Zbaraz*, 448 U.S. 358, 366 (1980).

der *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 541 (1939), to permit a direct appeal to this Court. See also *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304 U.S. 243, 249 (1938) (direct appeal lies "however the question of constitutionality may arise, provided the United States is or has become a party and the decision is against the validity of the Act"). Cf. *United States* v. *Raines*, 362 U.S. 17, 20 (1960).

II. THE TAX INJUNCTION ACT DEPRIVED THE DISTRICT COURT OF JURISDICTION OVER THIS CASE

The Tax Injunction Act, 28 U.S.C. 1341, provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

As this Court has recently emphasized, this statute is "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503, 522 (1981). The district court here failed to give deference to this purpose.

A. The Tax Injunction Act Is Applicable To This Case

Because the definition of "employment" subject to federal taxation under FUTA expressly excludes (26 U.S.C. 3306(c)(8)) service performed in the employ of a religious, educational, or other organization exempt from federal income tax under 26 U.S.C. 501(c)(3), no federal tax is involved in this case.

FUTA does require that states choosing to participate in the federal-state unemployment insurance program provide coverage for the employees of non-church affiliated religiously oriented schools. But unlike most employers subject to the state program, these nonprofit schools are not required to make regular contributions to the unemployment compensation fund from which the state benefits are paid. Instead, these employers may elect the reimbursement method of meeting their statutory obligations. Under that method, the employer is only required to reimburse the fund for any amount paid to the employer's former employees as unemployment benefits (26 U.S.C. 3304(a)(6)(B); Cal. Unemp. Ins. Code § 801 *et seq.* (West 1972 & Supp. 1980)).

Appellees do not dispute that their obligation under the state law is a tax for purposes of the Tax Injunction Act (see, *e.g.*, 81-455 J.S. 9);[9] their primary objection to the imposition of the tax appears to be to the burdens imposed by its record keeping and reporting requirements (81-228 Motion to Affirm 7-9; 81-455 J.S. 15). In any event, the Tax Injunction Act is broadly designed to protect the state fisc (cf. *Perez* v. *Ledesma*, 401 U.S. 82, 127 (1971)

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[9] They do suggest (81-228 Motion to Affirm 5 n.2) that the government's appeal, "insofar as it pertains to" the Tax Injunction Act, is untimely because we failed to pursue that issue in our interlocutory appeal to the Ninth Circuit from the issuance of a preliminary injunction. But the fact that an appeal may be taken from the grant of an interlocutory order under 28 U.S.C. 1292(a)(1) certainly does not require that such an appeal be pursued to this Court; the appeal from the final judgment can raise any interlocutory rulings in the case. *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980), and cases there cited.

(Brennan, J., concurring and dissenting)), and in barring interference with the collection of "any tax under State law" (28 U.S.C. 1341) it includes within that phrase "any extraction of property from a private person by a sovereign for its use." *Tramel* v. *Schrader*, 505 F.2d 1310, 1315 (5th Cir. 1975). Accord, *Robinson Protective Alarm Co.* v. *Philadelphia*, 581 F.2d 371 (3d Cir. 1978); *Alnoa G. Corp.* v. *Houston*, 563 F.2d 769 (5th Cir. 1977), cert. denied, 435 U.S. 970 (1978) (special assessments). Moreover, the ban extends not only to enjoining the actual assessment of the tax, but also to review of the related administrative procedures. *United States Steel Corp.* v. *Multistate Tax Commission*, 367 F. Supp. 107, 112 (S.D.N.Y. 1973) (conduct of audits of taxpayers); *Huber Pontiac, Inc.* v. *Whitler*, 585 F.2d 817, 819-820 (7th Cir. 1978) (methods of assessment and administrative procedures).

Finally, contrary to the suggestion of the district court (J.S. App. 20a-21a), the fact that the state tax statute was enacted in response to FUTA does not make the court's issuance of an injunction here consistent with the policies underlying the Tax Injunction Act. Those policies "relate not so much to considerations of federalism as to the peculiar needs of tax administration." *Perez* v. *Ledesma*, *supra*, 401 U.S. at 127 (Brennan, J., concurring and dissenting). Even when a state statute permits a state tax refund suit to be brought in a federal court, the Tax Injunction Act prohibits such suits. *United Gas Pipe Line Co.* v. *Whitman*, 595 F.2d 323, 330 (5th Cir. 1979). A fortiori, the fact that the state tax act reflects federal policies does not make the Tax Injunction Act inapplicable.

B. The Tax Injunction Act Exception Does Not Apply To This Case

The Tax Injunction Act does permit the federal courts to act when the state courts do not provide a "plain, speedy and efficient remedy." It is this exception that the district court primarily relied upon, and that appellees have urged in their Motion to Affirm (81-228 at 5-12). This Court in *Rosewell* v. *LaSalle National Bank, supra*, 450 U.S. at 522, concluded that "the 'plain, speedy and efficient remedy' exception to the Act's prohibition was only designed to require that the state remedy satisfy certain procedural criteria"—namely, "a 'full hearing and judicial determination' at which [appellees] may raise any and all constitutional objections to the tax." *Id.* at 514. Appellees here recognize that ample state procedures are available to them (81-228 Motion to Affirm 9).[10] Their complaint rather concerns the

[10] Before resorting to the courts, a California employer may administratively appeal any determination of employer liability. After an employer's administrative remedies are exhausted, it can file a state court action to recover contributions that were wrongfully collected. Cal. Unemp. Ins. Code § 1241 (West Supp. 1980). If an employer prevails in such an action it will be awarded interest on the money it was wrongfully required to pay to the state. Cal. Unemp. Ins. Code § 1242 (West Supp. 1980). If an employer is unsuccessful in its state court action, it may appeal through the California court system to the State Supreme Court. From there a litigant can, of course, seek final review in this Court. 28 U.S.C. 1257. The remedy available to appellees in California's courts is thus similar to that invoked in the state courts of South Dakota in the *St. Martin* case, *supra*.

This procedure for obtaining a refund of unemployment insurance taxes is analogous to other California tax refund procedures, which the Ninth Circuit has ruled to be "plain, speedy and efficient" for purposes of the Tax Injunction Act. *Mandel* v. *Hutchinson*, 494 F.2d 364, 367 (9th Cir. 1974); *Aronoff* v. *Francise Tax Board*, 348 F.2d 9, 10 (9th Cir. 1965);

"entanglement" resulting from compliance with those procedures.[11] This is scarcely a claim that the procedures are not "plain, speedy or efficient." Cf. *Rosewell* v. *LaSalle National Bank*, *supra*, 450 U.S. at 516-521 & n.20.

Instead, like the unsuccessful respondent in *Rosewell*, appellees argue that the state remedy is inadequate. They contend (81-228 Motion to Affirm 5-12) the remedies are inadequate because they require compliance with the assessment procedures as a prerequisite to the suit for a refund, and that very compliance is inconsistent with appellees' claimed constitutional rights. Even assuming that this remains a viable objection after *Rosewell*,[12] it is far from clear that it accurately reflects the state law. The

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Harsh California Corp. v. *County of San Bernardino*, 262 F.2d 626, 628, 630 (9th Cir. 1958).

[11] Appellees do suggest (81-228 Motion to Affirm 11-12) that appellees "pastors and parents" have no remedy under California law "since they do not actually pay the tax." "Pastors," of course, are exempt from coverage under the plain terms of the Acts. 26 U.S.C. 3309(b)(2), Cal. Unemp. Ins. Code § 634.5(b) (West Supp. 1980); their interest in the coverage of Category III schools—those not affiliated with any particular denomination—would probably be insufficient to give them standing to challenge the tax statute in any event. Similarly, given the particular state statutory scheme (pages 5, 16, *supra*), and the focus of appellees' objections on the record keeping and reporting requirements imposed on them, it is doubtful that the parents would have standing either.

[12] The Court in *Rosewell* noted that "[w]hen it passed the [Tax Injunction] Act, Congress knew that state tax systems commonly provided for payment of taxes under protest with subsequent refund as their exclusive remedy" (450 U.S. at 523), strongly suggesting that such systems provide an "adequate" remedy.

district court recognized that there is "some California authority for the proposition" that appellees could raise their constitutional claims in state suit to enjoin collection of the tax (J.S. App. 17a-18a n.12), but found the authority "neither compelling nor recent," and thus insufficient to "establish[]" the existence of an adequate state judicial remedy (*ibid.*). The district court cited no case indicating that the state courts would be insensitive to appellees' claims. And *Modern Barber Colleges, Inc.* v. *California Employment Stabilization Commission*, 31 Cal. 2d 720, 725-726, 192 P.2d 916, 919 (1948), which carefully analyzes the constitutional claim there at issue to determine whether it could be adequately protected by the refund procedure, or whether prior review was necessary despite the state anti-injunction statute, strongly suggests that the state courts would give careful consideration to appellees' claims.[13] Here, as in *Stone* v. *Powell*, 428 U.S. 465, 494 n.35 (1976), this Court should be "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." See also *Allen* v. *McCurry*, 449 U.S. 90, 104-105 (1980); O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801 (1981).

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[13] The decision in *Modern Barber Colleges, supra*, 31 Cal. 2d at 724, 192 P.2d at 918, also rejected the contention that assessments of contributions to the unemployment fund were "taxes" within the California Constitution's ban on tax-injunction suits. But see J.S. App. 17a.

C. This Court Should, Nevertheless, Decide This Case On Its Merits

In sum, appellees have made an insufficient showing that they have no "plain, speedy and efficient remedy" in the state courts; the district court should accordingly have dismissed the suit as required by the Tax Injunction Act.[14] Because it did not do so, but instead concluded that the identical provisions of the state and federal statutes were unconstitutional, it raised doubts about the continuing applicability of 26 U.S.C. 3309(b) that would not be resolved if this Court were to decide this appeal on purely jurisdictional grounds. In light of the public interest in, and the Secretary's need for, a definitive interpretation of 26 U.S.C. 3309(b), the Secretary urges this Court to conclude that special circumstances justify its consideration of the merits of the district court's issuance of the declaratory judgment against the federal defendants.

This Court has considered the merits in cases reaching this Court on direct appeal under 28 U.S.C.

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[14] The question whether the Tax Injunction Act deprives a federal district court of jurisdiction to entertain actions identical to the present one has been decided by seven federal courts. With the sole exception of the court below, these courts have unanimously concluded that the Tax Injunction Act is such a jurisdictional bar. *Stockton Metropolitan Ministry* v. *Glick*, Civ. No. S-80-807 MLS (E.D. Cal. Apr. 16, 1981); *Ascension Lutheran Church* v. *Employment Security Commission of North Carolina*, 501 F. Supp. 843 (W.D.N.C. 1980); *Independent Baptist Church of Red Bank* v. *State of Tennessee*, 468 F. Supp. 71 (E.D. Tenn. 1978); *St. John Lutheran Church, Inc.* v. *Giles*, Civ. No. 78-1516 (N.D. Ohio Jan. 18, 1979); *North Side Church of Christ* v. *State of Florida*, Civ. No. TCA 79-0705 (N.D. Fla. Jan. 2, 1980); *Harvest Baptist Temple, Inc.* v. *Commonwealth of Kentucky*, Civ. No. C-79-0620 L(B) (W.D. Ky. May 16, 1980).

1252 after noting that there was a substantial question whether the district court had jurisdiction of the appeal. See, *e.g.*, *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 32; *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975). Cf. *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 279 (1977). In those cases, as here, there was no doubt that the issues before the district court and this Court were constitutionally within the judicial power: they involve a "case or controversy" within Article III.

As this Court emphasized in *McLucas*, *supra*, 421 U.S. at 31, the purpose of Section 1252 is "to afford immediate review in this Court in civil actions [in] which the United States * * * will be bound by a holding of unconstitutionality." It is entirely consistent with this purpose for this Court to consider the "whole case" and, by reaching the merits, to remove the cloud on the constitutionality of FUTA created by the district court's unwarranted assertion of jurisdiction.

Finally, it is also consistent with the purposes underlying the Tax Injunction Act for this Court to reach the merits in this case and dispose of appellees' objections to FUTA and the California statute. In the absence of such a definitive rejection of the district court's constitutional analysis, the opinion below, although deprived of its precedential value, will remain as a practical threat to the efficient enforcement of the state tax laws. Cf. *Perez* v. *Ledesma*, *supra*, 401 U.S. at 127 (Brennan, J., concurring and dissenting).

III. FUTA IS CONSTITUTIONAL AS HERE APPLIED

A. Application Of FUTA To Category III Schools Does Not Violate The Establishment Clause

The court below held that unemployment coverage of employees of Category III schools was mandated by FUTA,[15] but that such coverage would result in excessive church-state entanglement in violation of the Establishment Clause of the First Amendment, which states that "Congress shall make no law respecting an establishment of religion * * *." This Court has held that the Establishment Clause is violated by the enactment of a law that establishes a religion or takes a step that could lead to such an establishment (*Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971); *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)).[16]

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[15] Plaintiffs below contended that Category III schools were "churches" within the meaning of 26 U.S.C. 3309(b)(1)(A) and Cal. Unemp. Ins. Code § 634.5(a)(1) (West Supp. 1980), and thus that their employees were statutorily exempt from unemployment coverage. The district court rejected that contention (J.S. App. 42a-43a), and appellees have urged only their constitutional claims in their Motions to Affirm and their Cross Appeal.

[16] This Court has stated that, although the Establishment Clause and the Free Exercise Clause of the First Amendment may at times overlap, "they forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel* v. *Vitale*, *supra*, 370 U.S. at 430. Decisions of this Court that have applied the Establishment Clause in overturning legislation, or upholding legislation against an Establishment Clause objection, have involved laws that *aided* religion or religious organizations. See, *e.g.*, *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973) (school aid); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (school aid); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970) (tax exemption); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968) (anti-evolution law); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) (Bible reading in schools).

The Court has utilized a three-pronged test where a statute raises an Establishment Clause question. Thus, a statute "does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion." *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 653 (1980). The court below held that FUTA failed to satisfy the third requirement.[17]

This Court has frequently emphasized that some contacts between church and state are inevitable. As was stated in *Lemon* v. *Kurtzman*, *supra*, 403 U.S at 614 (citations omitted):

> Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. * * * Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred,

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Here, however, the entire thrust of appellees' argument below was that FUTA coverage of employees of religiously oriented schools hinders, rather than assists, the exercise of religion. Such a claim, in our view, raises exclusively, or at least predominantly, issues under the Free Exercise Clause, discussed at pages 31-36, *infra*. In any event even if the analysis traditionally applied in Establishment Clause cases is applied, FUTA passes muster.

[17] Appellees briefly suggest (81-455 J.S. 16) that the primary effect of FUTA is to inhibit religion, because it requires the payment of "funds earmarked for religious purposes." But it seems scarcely subject to debate that the primary purpose of FUTA is to protect employees against the ravages of unemployment, and its primary effect is to do so without advancing or inhibiting religion. Indeed, as we show (pages 32-33, *infra*), any financial burden imposed on the Category III schools is *de minimis*.

> indistinct, and variable barrier depending on all the circumstances of a particular relationship.

The dispositive question—whether those church-state contacts are excessive—is thus one of degree. See *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 674. Here, the only church-state contacts necessarily resulting from coverage of Category III schools arise from the requirement that such schools register as employers with the California Employment Development Department ("EDD"), keep accurate employment records, make related reports to the EDD, and make certain employment information available to their employees. Cal. Unemp. Ins. Code § 1085 *et seq.* (West 1972 & Supp. 1980). The records and reports required of employers concern such innocuous matters as the hours worked by, and wages paid to, each employee; the date each employee was hired and separated from employment; and the total number of employees and wages paid in each calendar quarter. This type of routine recordkeeping does not significantly entangle church and state. Indeed, the recordkeeping involved here is more routine and less extensive than the recordkeeping involved in the reimbursement process in *Committee for Public Education and Religious Liberty* v. *Regan*, *supra*, which this Court held not to constitute excessive entanglement. 444 U.S. at 659-661.[18]

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[18] The New York law challenged in *Regan* reimbursed private schools (including parochial schools) performing certain secular testing and reporting functions. The State monitored this reimbursement scheme to insure that State funds were not being used for religious purposes. This State monitoring required the parochial schools to submit to the State Commissioner of Education an application for reimbursement and further required submission of additional reports and

The court below indeed recognized that coverage of Category III schools does not involve impermissible "entanglement of the 'monitoring variety" (J.S. App. 66a).[19] Instead of finding any constitutional fault with what is required by the unemployment insurance scheme actually established by the federal and state laws, the court focused solely on potential problems it discerned in the methods the state used in determining a former employee's eligibility for unemployment benefits. The court's speculations about how religious questions might arise in making benefit determinations, and how the parties might deal with them (J.S. App. 68a-71a) are an insufficient basis for striking down a federal statute. Cf. *Com-*

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documents as prescribed by the Commissioner. 444 U.S. at 659. The law additionally required that the Commissioner audit all vouchers and other documents submitted by the parochial schools in order to substantiate their claims. Furthermore, the challenged law mandated the State Department of Audit and Control to inspect, from time to time, the accounts of recipient schools in order to verify the costs allegedly due. 444 U.S. at 660.

[19] The minimal church-state contacts that are involved under the federal-state unemployment insurance scheme at issue here do not approach the potential entanglement identified by this Court in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). There, the possible imposition of mandatory collective bargaining concerning the teaching mission of parochial schools raised the possibility that the National Labor Relations Board would become involved in "nearly everything that goes on in the schools." *Id.* at 503. Here, by contrast, the state would be concerned only with unemployment payments to an individual after his employment relationship with the school had been terminated, which would have no impact on the exercise of the school administration's discretion in operating the school.

mittee for Public Education and Religious Liberty v. *Regan*, *supra*, 444 U.S. at 660-661.

In any event, the benefit-determination procedures are most unlikely to require the state to inquire into matters of religious doctrine or morality.[20] FUTA permits participating states to deny or reduce unemployment benefits to persons who were discharged for misconduct connected with their work. 26 U.S.C. 3304 (a)(10). Based on this provision, all 50 states, including California, deny or reduce benefits to any former employee who is dismissed for "misconduct connected with his most recent work." Cal. Unemp. Ins. Code § 1256 (West Supp. 1980). A former employer has a financial stake in such a determination because the fewer the benefits paid to former employees, the lower an employer's financial obligation to the state will be (see pages 5, 16, *supra*).

The district court held that the misconduct determination might raise Establishment Clause problems in the case of employees of religiously oriented schools, because those employees may be dismissed for religiously motivated reasons. The court stated that in determining whether such an employee was dismissed for misconduct, making him ineligible for benefits, the state will be required to second-guess the school's determination in matters of religious doctrine or morality. Such essentially religious determinations by the state, the court concluded, would violate the First Amendment.

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[20] Even if such an inquiry were occasionally necessary, this Court has often recognized that some limited inquiry into religious matters may be necessary and permissible in the course of resolving purely secular legal issues. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972); *United States* v. *Ballard*, 322 U.S. 78 (1944).

The district court's analysis misperceives the nature of the state's inquiry in an eligibility determination. The Category III Schools involved in this action serve persons who belong to a number of different Christian sects. While the religious beliefs of such persons no doubt differ on a number of issues, presumably on other issues they share certain religious beliefs. The state has no need to evaluate or apply these religious beliefs. The state's concern—in the case of a claimant who was discharged from his job—is a quite distinct question: whether the actions for which the claimant was discharged constituted "misconduct" under the legal standards of Cal. Unemp. Ins. Code § 1256 (West. Supp. 1980).

The answer to that question has nothing to do with determining what is "true" doctrine or what is "immoral" conduct. Rather, the answer has to do with work rules. Teaching "false" doctrine is not, of course, misconduct under Cal. Unemp. Ins. Code § 1256. However, failure to abide by an established work rule is misconduct. Religiously oriented schools have it in their power to establish whatever work rules their religion requires (*e.g.*, a requirement that school teachers teach doctrinal matters as instructed by the school principal; or a rule that school employees abstain from drinking alcoholic beverages). The challenged laws impose no restrictions whatsoever on the establishment of such religiously motivated work rules. Once those rules are agreed to by a school and its employees, a teacher discharged for violating such a rule will be guilty of misconduct under California law and therefore ineligible for benefits. However, this determination will not be because the state has decided what is "true" doctrine or what constitutes "moral" behavior; rather, it will be based

on the state's determination that the former employee violated an agreed-upon work rule.

In short, the federal and state unemployment compensation laws in no way limit an employer's ability to establish whatever work rules it wishes and to require adherence to them as a condition of employment. School authorities may interpret their religious doctrines in whatever manner they wish, and establish corresponding work rules requiring adherence to their interpretations.[21] Whether those interpretations accurately reflect that religious doctrine is quite beside the point. Deliberate refusal to abide by an established work rule would in any event constitute misconduct under Cal. Unemp. Ins. Code § 1256. Accordingly, there is no need for the state to evaluate or apply a school's interpretation of the religious beliefs it follows.[22]

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[21] Contrary to the assumption of the district court (J.S. App. 70a), these work rules need not themselves attempt any comprehensive definition of accepted doctrinal positions; they may simply require the teacher to conform to the principal's interpretations of doctrinal matters. In that situation, the only possible question is whether the employee had sufficient warning that his conduct was inconsistent with the principal's interpretation—a question that raises due process, not religious, issues.

[22] The court also seems to suggest (J.S. App. 70a) that a dismissal for lack of "religious fervor" might raise entanglement problems. But it is most unlikely that a school could credibly contend that the lack of religious fervor was sufficient of itself to establish misconduct. Instead, it would seem closely analogous to dismissals for incompetence by other employers, and would presumably entitle the employee to benefits without further inquiry. To the extent that this result might tend to discourage such dismissals, it raises issues under the Free Exercise Clause (pages 31-36, *infra*), not entanglement concerns.

The history of the federal-state program and the record in this case support our position that the district court's predictions of entanglement problems are inaccurate.[23] Coverage of religious organizations under the unemployment compensation system is not a new phenomenon. Colleges—including those with a religious orientation—have been covered since the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695. Similarly, employees of elementary and secondary schools—including those with a religious orientation—were previously covered by the unemployment compensation system, from 1974 to 1978, under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974, Pub. L. No. 93-567, 88 Stat. 1850 *et seq.* In most states all such elementary and secondary school employees were covered under the Secretary of Labor's interpretation of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667 *et seq.*, from 1978 until this Court's recent rejection of that interpretation in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*. Outside of the educational context, other religiously oriented organizations not directly controlled by a church or convention or association of churches have been covered since enactment of the Employment Security Amendments of 1970.

Notwithstanding this history of coverage, plaintiffs below presented no evidence that they or any other religiously oriented organization had ever been involved in a single actual claim for unemployment

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[23] They also refute appellees' equally speculative assertions (81-228 Motion to Affirm 16 n.8) about the effects of the exceptions to the "work rule" requirement in Cal. Admin. Code tit. 22, § 1256-36(b)(2) (1981).

benefits that required an inquiry into church doctrine. Indeed, two witnesses offered by appellants, who were highly experienced in the field of unemployment compensation hearings, testified that they had never conducted, attended, or read a transcript of a hearing where such religious issues had ever been raised (J.A. 111, 155). Thus, the decision below regarding entanglement is not based on the requirements of the law or the evidence in the record. It rests only on a misunderstanding of what a benefit eligibility determination requires and speculation as to what such a determination might entail. As this Court has said on numerous occasions, it will not accept Establishment Clause arguments based on hypothetical facts or presumptions of bad faith by government officials. *Wheeler* v. *Barrera*, 417 U.S. 402, 426-427 (1974); *Committee for Public Education and Religious Liberty* v. *Regan*, *supra*, 444 U.S. at 660-661.

B. Application Of FUTA To Category III Schools Does Not Violate The Free Exercise Clause

The Free Exercise Clause of the First Amendment bars Congress from making any law "prohibiting the free exercise" of religion. In order to show a violation of that clause, "it is necessary * * * for one to show the coercive effect of the enactment as it operates against him in the practice of his religion [because] a violation of the Free Exercise Clause is predicated on coercion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963). In the case at hand, the unemployment insurance coverage of employees of religiously oriented non-church schools involves neither the taxing of the practice of religion, nor any other type of coercion.

FUTA and the complementary state law, the California Unemployment Insurance Code, are neutral, social welfare legislation. These laws form one part

of the federal-state unemployment compensation system that protects working persons, their families and their communities against the potentially disastrous effects of sudden unemployment. This unemployment compensation system—which expressly *excludes* ministers, members of religious orders, and employees of churches, associations of churches, or of church affiliated schools (26 U.S.C. 3309(b); Cal. Unempl. Ins. Code § 634.5 (West Supp. 1980); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*)—has, at most, only an indirect and incidental effect on the exercise of religion.[24] Accordingly, appellees carry a heavy burden in challenging the application to them of FUTA and the corresponding provisions of the California Code. As four members of this Court have admonished:

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature.

Braunfeld v. *Brown*, 366 U.S. 599, 606 (1961) (plurality opinion). Appellees' objections do not withstand such critical scrutiny.

Coverage of Category III school employees under FUTA, and the California Unemployment Insurance Code, does not automatically result in the levy of a flat tax on those schools. Rather, a covered school would have to reimburse the California unemployment insurance fund only if one of its former em-

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[24] In light of these exclusions, appellees' claims that the statutory scheme impacts on "churches, pastors and religious schools" are inaccurate (81-228 Motion to Affirm 7, and *passim*; 80-455 Cross-J.S. *passim*).

ployees applies and qualifies for unemployment benefits. Unlike for-profit corporations, nonprofit schools are not required to make regular contributions or tax payments to the unemployment compensation fund. These schools, like other nonprofit organizations, may instead elect the reimbursement method to meet their obligations under the unemployment compensation laws. 26 U.S.C. 3304(a)(6)(B). An employer electing the reimbursement method is liable only for those statutorily limited amounts paid out to the employer's former employees in the form of benefits. Such benefits are not automatically paid to all individuals who become unemployed. Rather, because the filing of a claim and the meeting of eligibility requirements are conditions precedent to the receipt of benefits, a Category III school electing the reimbursement method will not be required to pay any amount into the state's unemployment fund unless the former employee seeks, and is found entitled to, benefits.[25]

Such a statutory scheme, wherein no liability may ever occur, will have little, if any, impact upon appellees' religious practices and therefore can hardly be characterized as coercive. Thus, there is ample support for the specific finding of the court below that "the record as a whole does not support the conclusion that the effect of the additional financial burden will be significantly harmful" (J.S. App. 59a).

Even if some Category III school employees can be expected to seek and obtain unemployment com-

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[25] If appellees' statement that as "a matter of religious principle * * * they accept no governmental assistance" (81-228 Motion to Affirm 13) accurately reflects the religious beliefs of church members who are Category III school employees, few claims for benefits can be anticipated. See also 81-455 Cross-J.S. 10.

pensation payments, so that the statutory scheme can be assumed to impose a financial burden on appellees' schools, this is insufficient to invalidate it under the Free Exercise Clause. In *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 605, this Court refused to invalidate a law on First Amendment grounds merely because it imposed a financial burden based on religious beliefs. The law challenged there required the closing of certain types of businesses, including appellants' stores, on Sunday. Appellants were members of the Orthodox Jewish faith, which required them to close their businesses on Saturday. Prior to the Sunday Closing Law, they had compensated for this Saturday closing by doing a substantial amount of business on Sunday. Thus the required Sunday closing had a severe economic impact, impairing the ability of all the appellants to earn a livelihood and rendering one unable to continue in his business. Despite this severe financial hardship, the Court refused to invalidate the law simply because it operated "so as to make the practice of [appellants'] religious beliefs more expensive." *Ibid.* As the plurality opinion explained (*id.* at 606-607):

> [I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment.

Compared to the severe financial burden imposed in *Braunfeld*, the financial obligation that may be

imposed here, if indeed there is any, is de minimis. Thus, cross-appellants' argument that the imposition of the FUTA tax unconstitutionally burdens their religious activities is without basis in either fact or law.[26]

Furthermore, the unemployment tax or reimbursement is not, as appellees claim, a tax on a religious ministry or religious acts. Rather, the tax is on the employment relationship between California employers and their employees—including those employers who operate religiously oriented schools not affiliated with any church. Thus, appellees can no more claim a First Amendment exemption from the unemployment tax than they could from the assessment of income or social security taxes based on such employment. As the court below correctly stated (J.S. App. 62a):

> To hold otherwise would be to adopt the view that any thing or activity remotely connected to the exercise of religion or to those who engage in it is constitutionally immunized from taxation. That no such view was intended by the United States Supreme Court in *Murdock* [v. *Pennsylvania*, 319 U.S. 105 (1943)] and *Follett* [v. *McCormick*, 321 U.S. 573 (1944)], *supra*, is demonstrated by dicta, in both cases, expressly approving the taxation of the income of ministers

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[26] Indeed, in the present context an equally plausible Free Exercise claim could be made if Congress had chosen the course appellees advocate, and had excluded the employees of fundamentalist schools "*because of their faith, or lack of it*, from receiving the benefits of public welfare legislation"—*i.e.*, protection under the unemployment insurance program. *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947) (emphasis in original). See also *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963).

> or of church property (*Murdock*, *supra*, 319 U.S. at 112; *Follett*, *supra*, 321 U.S. at 578).

Accord, *Parker* v. *Commissioner*, 365 F.2d 792, 795 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967); *Basic Unit Ministry of Alma Karl Schurig* v. *United States*, 511 F. Supp. 166, 168-169 (D.D.C. 1981).

Even if there were any merit to cross-appellants' contention that FUTA has a coercive effect on the exercise of their religion, such an effect would be permissible in light of the important governmental interests served by FUTA. The district court, recalling the tragic economic history that led to the enactment of FUTA, concluded (J.S. App. 65a):

> [A]nyone having the slightest familiarity with the history of the Great Depression can have no doubt that the interest which the various unemployment compensation statutes have been designed to serve is a compelling one.

See also *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 131 (1971). Thus, assuming, arguendo, that FUTA has some coercive effect on the exercise of religion, it is still valid under the First Amendment because it is justified by "a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate * * *.'" *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963), quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). In sum, appellees' Free Exercise arguments were properly rejected by the district court.

C. Application Of FUTA To Category III Schools Does Not Deny Equal Protection Of The Laws

The district court noted, but found it unnecessary to consider, appellees' claim that treating Category III schools differently from church-affiliated schools

would constitute a denial of equal protection in violation of the Fifth Amendment (J.S. App. 74a-76a).

Equal protection analysis requires merely that there be some rational basis for the challenged legislative classification, except in those few cases where the classification impermissibly interferes with the exercise of a fundamental interest or affects with particularity a protected class. *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 489 (1977). In the present case, the challenged laws make no distinctions between religions or religious beliefs. All religions are equally eligible to establish church affiliated schools to qualify for the exemption under 26 U.S.C. 3309(b)(1) and Cal. Unemp. Ins. Code § 634.5 (West Supp. 1980), and all other schools, including Category III schools, are subject to identical coverage regardless of their religious orientation or lack of it.[27] Thus, the challenged classification must simply meet the rational basis test. As this Court has stated that standard:

> This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. *Dandridge* v. *Williams*, [397 U.S. 471,] 485 [(1970)]. Such action by a legislature is presumed to be valid.

Massachusetts Board of Retirement v. *Murgia*, 427 U.S. 307, 314 (1976), quoted in *Ohio Bureau of Employment Services* v. *Hodory*, *supra*, 431 U.S. at 489. Appellees' equal protection claim is without

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[27] The challenged statutes obviously involve no suspect classifications; appellees represent no specially protected class.

merit, since there is a rational basis for distinguishing between Category I and Category II schools on the one hand, and Category III schools on the other.[28]

It is not unreasonable to conclude that non-church schools, even these with a strong religious orientation, should be treated like secular schools rather than like the church-controlled schools that are entitled to the statutory exemption. The decision to treat these schools differently from church-run schools is justified on several grounds: First, church-run schools are more likely to have a strong and specific religious orientation than interdenominational schools or those established and run by the laity. Second, the risk of church-political entanglement is greater when church-controlled schools are involved. See *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 622-623; *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 794-798 (1973).

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[28] Appellees' misapprehend Equal Protection analysis in asserting (81-228 Motion to Affirm 12-13) that their Category III schools are entitled to be treated like church schools because the district court found that the record here establishes that appellees' Category III schools are in fact "virtually identical" to church schools. As this Court has often emphasized, it is not a constitutional requirement that a challenged statutory classification "precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute", *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975); *Mathews* v. *Lucas*, 427 U.S. 495, 516 (1976). The Due Process Clause of the Fifth Amendment prohibits only the use of classifications that are "patently arbitrary" and "utterly lacking in rational justification." *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 768, quoting *Fleming* v. *Nestor*, 363 U.S. 603, 611 (1960). It is thus not enough to show that appellees' schools could reasonably be treated like Category I or II schools, or even that the reasons supporting the statutory classification do not in fact apply to their particular schools.

Third, there is a greater likelihood that employees of church-controlled schools will be provided with non-governmental assistance, through church relief programs, for economic hardship caused by unemployment. Finally, the distinction is practical to administer. It is relatively easy to determine whether a particular school is church controlled, but may be very difficult to determine whether it is sufficiently "religious" to qualify for exemption as a Category III school. Even aside from the difficulty of formulating standards in this area, application of those standards would involve a substantial risk of government intrusion into a constitutionally sensitive area. Congress should not be presumed to have intended such a constitutionally sensitive inquiry in the absence of an "affirmative intention of the Congress clearly expressed." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 506 (1979).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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Nos. 81-31, 81-228 and 81-455

IN THE

Supreme Court of the United States

October Term, 1981

STATE OF CALIFORNIA, *et al.*,

Appellants,

vs.

GRACE BRETHREN CHURCH, *et al.*,

Appellees.

On Appeal From the United States District Court for the Central District of California.

REPLY BRIEF OF APPELLANTS, STATE OF CALIFORNIA, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, AND THE DIRECTOR OF THE CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT.

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Preliminary Statement.

Subsequent to the filing of the opening briefs in the present matter, this Court's decision in *United States v. Lee*, 50 U.S.L.W. 4201 (U.S., February 23, 1982) was handed down. That decision is dispositive of much of the appellees'[1] arguments herein, particularly with respect to their Free Exercise and Equal Protection arguments.

In *Lee*, this Court rejected the Free Exercise arguments of an Amishman who contended that not only the payment of social security taxes, but also the receipt of social security

[1] "Appellees" includes the plaintiffs in both the Grace Brethren case and the Lutheran case.

benefits was directly prohibited by his religion. Although a more direct conflict between the Amish faith and the obligations imposed by the social security system existed in *Lee* than is present in the instant case, this Court concluded that the social security tax was constitutional as applied to the Amishman. In reaching its conclusion, this Court recognized that not all burdens on religion are unconstitutional and further that limitations on religious liberty may be justified if they are essential to accomplish an overriding governmental interest. *Lee, supra*, 50 U.S.L.W. 4201, 4203. This Court had little difficulty in finding such an overriding governmental interest due to the comprehensive nationwide nature of the social security system. *Ibid.* As this Court aptly noted, the unemployment compensation tax program involved herein is part of this comprehensive system. *Id.* at 4202, fn. 1.

In *Lee*, this Court also took note that Congress accommodated religious beliefs to the extent compatible with a comprehensive national program by providing for a limited exemption from social security taxes for self-employed Amish and others satisfying the criteria under 26 U.S.C. § 1402(g). *Id.* at 4204. This Court concluded that Congress' accommodation and resulting classification of employers was quite permissible. *Ibid.* The line Congress drew in 26 U.S.C. § 1402(g) provided for a "narrow category which was readily identifiable." *Ibid.* In the present matter, the State has demonstrated that a similar accommodation and classification was made by Congress in enacting the 26 U.S.C. § 3309(b)(1) exemption statute. *See*, State Amended Brief, pp. 31-35.

In all, this Court's decision in *Lee* is completely consistent with the State's position in the instant case and should provide compelling authority in the resolution thereof.

ARGUMENT.

I.

No Violation of the Free Exercise Clause Results From the Inclusion of Employees of Religious Schools in the Unemployment Compensation Tax Program.

As was noted above, this Court's decision in *Lee* effectively disposes of all the appellees' Free Exercise arguments. The interference with religious activity alleged by the appellees does not even approach the level of conflict which was present in *Lee*. Unlike the taxpayer in *Lee*, appellees do *not* contend that the payment of unemployment taxes and the receipt of unemployment benefits are prohibited by their religion. Rather, the appellees argue *inter alia* that the unemployment compensation tax program would impose an administrative and tax burden on the religious employers, would interfere with the right of the religious employers to employ who they wish, would interfere with parents' ability to choose a religious education for their children and would interfere with the opportunity of religious teachers to carry out their religious vocation, etc. *See*, Brief for Grace Brethren Church, pp. 28-36; Brief of Lutheran Church, pp. 26-32. Plainly, none of these alleged "burdens" is equal to or greater than the burden found in *Lee*. Moreover, as was pointed out in the State's Amended Brief, the injury to the Free Exercise rights of appellees is actually nothing more than the purely financial burden the program would impose upon them. *See*, State Amended Brief, pp. 27-30. In light of *Lee*, this "burden" is not enough to overturn a valid tax which is neutral in its general application.

The Grace Brethren appellees also contend that the unemployment tax is on a purely religious activity. *See*, Brief for Grace Brethren Church, pp. 28-31. The State respectfully disagrees. As in *Lee*, once the appellees have become

involved in an employer-employee relationship, they then have entered into a *commercial activity* and must abide by the rules governing others in that activity. *United States v. Lee, supra*, 50 U.S.L.W. 4201, 4204. It is irrelevant that one or both of the parties to the relationship are religious. It is still a commercial activity and may be subject to said rules.

Moreover, the Grace Brethren appellees' argument that the unemployment compensation tax program somehow results in an ongoing involvement between the employer and the State is extremely misleading. *See*, Brief for Grace Brethren Church, pp. 22, 34. Contrary to their assertions, there are no entry audits or continuing inspections required under the law. In fact, if the religious employer elects the reimbursement method of contribution, its contact with the State would indeed be minimal since no taxes are owed unless unemployment benefit claims are filed by and unemployment benefits are paid to its discharged employees. Allowing the religious employers the right to use the reimbursement method was an attempt by Congress to accommodate the religious beliefs of these employers. *See*, State Amended Brief, pp. 28, 33-35.

Finally, as was noted above, there is indeed a compelling governmental interest in providing a comprehensive nationwide unemployment insurance program. *See, United States v. Lee, supra*, 50 U.S.L.W. 4201, 4203; State Amended Brief, p. 30. As in *Lee*, there is broad public interest in maintaining a fiscally sound tax system which would be severely jeopardized by extending the exemption provided in 26 U.S.C. § 3309(b)(1) to the non-church affiliated appellees involved herein.

II.

No Violation of the Equal Protection or Religion Clauses Results From the Inclusion of Employees of Unaffiliated Religiously Oriented Schools in the Unemployment Compensation Tax Program.

Both the Grace Brethren appellees and the *amicus curiae* argue that it is unconstitutional to deny the exemption to religious organizations which are unaffiliated with a church while allowing church-affiliated organizations to be so exempt. The State has demonstrated that this argument is devoid of merit. *See*, State Amended Brief, pp. 31-35. This Court's decision in *Lee* provides additional persuasive authority in support of the State's contentions.

As was previously pointed out, the decision in *Lee* indicates that there is *no* constitutional right to a tax exemption for the religious employer. Congress is permitted great latitude in classifying employers as exempt or non-exempt. Accordingly, this Court in *Lee* applied the strict standard regarding tax exemptions in general and held that "the tax imposed on employers to support the social security system must be uniformly applicable to all, *except as Congress provides explicitly otherwise*." *United States v. Lee*, *supra*, 50 U.S.L.W. 4201, 4204. A similar standard is compelled in the instant matter as well.

As in *Lee*, Congress has confined the 26 U.S.C. § 3309(b)(1) exemption to a narrow category which is readily identifiable — churches and religious organizations which are controlled by churches. In the State's Amended Brief, the legislative history behind the 26 U.S.C. § 3309(b)(1) exemption was examined. *See*, State Amended Brief, pp. 33-35. The history indicates that although Congress recognized that low unemployment generally existed in religious organizations, Congress was concerned with the fact

that unemployment still affected a substantial number of their employees.[2] Therefore, Congress attempted to accommodate religious organizations in much the same way as it did under 26 U.S.C. § 1402(g). In fact, Congress not only continued the exemption from federal unemployment taxes for all religious organizations as well as the exemption from state unemployment taxes for churches and church affiliated organizations, but also further accommodated non-church affiliated religious organizations by permitting them to use the reimbursement method of contribution with respect to state unemployment taxes.

The argument put forth by the Grace Brethren appellees and the *amicus curiae* that church affiliated employers and non-church affiliated employers have equal status under the First Amendment and therefore both must be exempt from unemployment taxation is effectively answered by the decision in *Lee*. Although there is virtually no difference in status under the First Amendment between self-employed Amish and non-self-employed Amish, this Court in *Lee* sustained the limitation of the exemption to the former alone. A similar result is mandated here as well.

In its Amended Brief, the State also pointed out that the line drawn between churches and non-churches in 26 U.S.C. § 3309(b)(1) avoids excessive governmental entanglement with religious entities. *See*, Amended Brief, pp. 31-35. It keeps the State out of the business of evaluating the relative

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[2]Congress was obviously cognizant of the fact that unlike social security retirement benefits and disability benefits, it would be less likely for a religious employer to provide on its own unemployment benefits for a discharged employee. Indeed, in the instant case, there is testimony that Redwood Christian Schools has its own disability program, but *no* evidence that it would institute its own unemployment program if it was not required to participate in the federal-state program. (*See*, R.T. pp. 50-52 — R.T. refers to Reporter's Transcript of proceedings before Honorable Mariana R. Pfaelzer on August 12-13, 1980.)

merits of differing religious claims. *See, United States v. Lee, supra*, 50 U.S.L.W 4201, 4204, fn. 2. (Stevens, J., concurring); *see also, Carmichael v. Southern Coal & Coke Co.* (1937) 301 U.S. 495, 512-513. (Exemption of particular classes of employers may be explained by administrative convenience or fear of constitutional restrictions). Plainly, if there was to be an exemption at all, a line had to be drawn somewhere. Without a clear demarcation, a significant potential for abuse would arise, because any entity choosing to call itself religious could be exempt simply by virtue of that choice. The line drawn by Congress strikes a reasonable balance between sincerely held religious beliefs and protection for employees against unexpected wage loss.[3]

III.

No Violation of the Establishment Clause Results From the Inclusion of Employees of Religious Schools in the Unemployment Compensation Tax Program.

The appellees go to great lengths in their briefs in attempting to demonstrate the potential for excessive entanglement in the benefit eligibility determination process. However, upon close scrutiny of the Grace Brethren appellees' "thirteen points of entanglement" and the Lutheran appellees' similar assertions, it becomes evident that the alleged entanglement objected to by both is merely whether the religious employer can be forced to prove that an established work rule existed and that it was knowingly violated by the employee. In essence, the appellees are arguing

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[3]The determination under 26 U.S.C. § 3309(b)(1)(B) of whether a religious school, which is operated, supervised or controlled by a church or association of churches, is operated primarily for religious purposes, is effectively controlled by this Court's decisions in *Meek v. Pittenger* (1975) 421 U.S. 349, 365-366 and *Lemon v. Kurtzman* (1971) 403 U.S. 602, 613-618. Notwithstanding the Grace Brethren appellees' assertions to the contrary, that determination is quite dissimilar to the determination of whether a school has a sufficiently religious mission or curriculum content.

that they cannot be constitutionally forced to do anything by the government. However, as this Court indicated in *Lee*, this is simply not the case once a commercial activity, in this instance an employer-employee relationship, is entered into. The appellees must abide by the rules governing others in that same activity. Furthermore, as was shown in the State's Amended Brief, the precise type of inquiry required in benefit eligibility hearings is permissible under the standards set forth in the church property cases decided by this Court. *See*, State Amended Brief, pp. 21-27. In particular in *Jones v. Wolf* (1979) 443 U.S. 595, this Court held that it was constitutionally permissible to require the interested parties to modify the deeds, charters or church constitution in order to ensure that a certain result would be reached by the civil courts adjudicating the dispute. *Id.* at 606. The burden involved in taking such steps was held to be minimal. *Ibid.* Civil courts would be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form. *Ibid.* Consistent therewith, it would not be an unconstitutional burden to require the religious employer to put its work rules in a legally cognizable form if it wished to ensure a particular result in a benefit eligibility hearing.[4]

The appellees rely heavily on *Catholic Bishop v. NLRB* (7th Cir. 1977) 559 F.2d 1112, aff'd (1979) 440 U.S. 490, as support for their contentions that unconstitutional entan-

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[4]It is in this light that Grace Brethren appellees' reference to a benefit eligibility hearing in which the phrase "attending church regularly" was interpreted by the Administrative Law Judge must be viewed. *See*, Brief of Grace Brethren Church, p. 16. Had the employer specifically defined "regularly" and set forth the definition in a legally cognizable form which was established and known to the employee, the employer could have ensured the rejection of the discharged employee's claim for unemployment benefits.

glement exists in the benefit eligibility determination process. Their reliance is misplaced for several reasons.

To begin with, although the Seventh Circuit in *Catholic Bishop* concluded that an NLRB attempt to exercise its broad jurisdiction over diocesan schools to determine whether a particular personnel practice constituted unfair labor practices, would foster excessive governmental entanglement, this Court declined to decide the First Amendment question. Nevertheless, there are a number of facts which distinguish the situation in *Catholic Bishop* from the present case.

In *Catholic Bishop*, the issue involved mandatory collective bargaining which by its own nature would affect the development of curriculum, faculty standards, working conditions and other aspects of school operations. The unemployment compensation tax program would not necessitate any ongoing governmental involvement in any of these or other areas and in fact would not even come into play until an employee had been terminated and was no longer connected in any way with a particular school. In addition, the financial impact of the unemployment compensation tax program cannot be compared with the financial ramifications of NLRB jurisdiction over diocesan schools. Unlike the unemployment compensation tax program, the NLRB has the power to order reinstatement of employees with back pay and to utilize judicial authority to enforce its rulings. *See*, 29 U.S.C. § 160(c), (e). Finally, unlike the present case where there is only speculation that benefit eligibility hearings which necessitate an inquiry into church doctrine might occur, there was *actual* proof of unfair labor practices

in *Catholic Bishop*. In all, *Catholic Bishop* is simply not supportive of appellees' position herein.[5]

The appellees have also argued that the State is attempting to improve the trial record, specifically regarding the testimony of Mr. Streett and Mr. Carter. This is simply not the case. The State is only suggesting that the federal witnesses' testimony be closely scrutinized. Upon such a review it can be seen that in addition to no actual proof of excessive entanglement existing herein, the federal standards to be used in benefit eligibility hearings are in fact *neutral secular* standards which are to be used in all situations. Indeed, there was testimony that *no* specific guidelines or standards exist for religious employers. *See*, R.T. pp. 175, 232. These *neutral secular* standards are identical to the standards set forth under California law. That is, in a benefit eligibility hearing, the employer has the burden of proving that an established work rule was knowingly violated. *See*, State Amended Brief, pp. 21, 24. Consequently, regardless of whose burden it is to show either the potential for excessive governmental entanglement or the

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[5]The Seventh Circuit recently distinguished *Catholic Bishop* in a case involving the enforcement of an Internal Revenue Service summons relating to the determination of entitlement to a tax exemption for a church. In *United States v. Dykema* (7th Cir. 1981) 666 F.2d 1096, the Court held that in determining whether a church is operated exclusively for religious purposes (26 U.S.C. § 501(c)(3)), it is necessary and proper for the Internal Revenue Service to survey *all* activities of the organization and to evaluate said activities by the use of *objective criteria*. *Id.* at 1100. Further, the Court concluded that such an evaluation would not require the Service to enter into a subjective inquiry with respect to religious truth which would be forbidden by the First Amendment. *Ibid.* Finally, the Court stated with respect to *Catholic Bishop*:

> "Clearly also there is no continuing supervision or regulation of the religious mission of the organization such as was condemned in *NLRB v. Catholic Bishop of Chicago* (citation omitted)." *Id.* at 1100, fn. 5.

The Seventh Circuit's conclusions are entirely appropriate herein as well.

absence thereof, the conclusion is inescapable that no potential for excessive governmental entanglement has been demonstrated.

Finally, in response to the State's use of the church property cases, the appellees attempt to equate the benefit eligibility determination process wherein it is decided whether an employee knowingly violated an established work rule, to the weighing and interpreting of church doctrine prohibited in *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440. In doing so, the appellees ignore the crucial distinction between examining church documents to determine how the parties decided to govern a particular religious organization and actually determining what the true faith is. The former is permissible under the *Jones v. Wolf* standard. Similarly, it is constitutionally permissible for the State to determine whether the employee knew of the work rule he allegedly violated. *See*, State Amended Brief, pp. 24-25. In effect, a religious employer cannot label everything "doctrine" and thereby foreclose any governmental contact with the commercial activities of the employer. *See, Presbyterian Church v. Hull Church, supra*, 393 U.S. 440, 453 (Harlan, J., concurring); *Heffron v. Int'l. Soc. For Krishna Consc.* (1981) ____ U.S. ____, 69 L.Ed.2d 298, 309. As the State pointed out in its opening brief, the benefit eligibility hearing is closely analogous to a breach of contract adjudication in that the employer is in essence alleging the employee knowingly violated his or her "contract of employment." *See*, State Amended Brief, p. 26. The adjudication is and can be conducted under a neutral principles approach. As such it is quite permissible under the First Amendment.

Conclusion.

For the reasons heretofore stated, the judgment of the District Court insofar as it is challenged by the State's appeal should be reversed.

Respectfully submitted.

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Nos. 81-31, 81-228 and 81-455

In the Supreme Court of the United States

OCTOBER TERM, 1981

CALIFORNIA, ET AL., APPELLANTS

v.

GRACE BRETHREN CHURCH, ET AL.

UNITED STATES, ET AL., APPELLANTS

v.

GRACE BRETHREN CHURCH, ET AL.

GRACE BRETHREN CHURCH, ET AL., CROSS-APPELLANTS

v.

UNITED STATES, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

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1. Appellee Grace Brethren Church points to 13 potential areas of state inquiry into religious beliefs in benefit determination proceedings (Br. 7-8). But most such inquiries would be relevant *only* if the employer school failed to establish a work rule requiring the teacher to conform to the

principal's interpretation of doctrinal and moral matters, as suggested in our main brief at 28-29.[1] Any possible entanglement of the state in the school's religious affairs that results solely from the school's own failure to establish such a work rule should not be a basis for excusing the school from its tax obligation on First Amendment grounds. Cf. *United States* v. *Lee*, No. 80-767 (Feb. 23, 1982), (Stevens, J., concurring), slip op. 3 n.3.

2. Appellee Grace Brethren's Free Exercise Clause arguments are substantially answered by this Court's recent decision in *United States* v. *Lee*, *supra*. In rejecting the claim by an employer to a religious exemption from the payment of Social Security and unemployment taxes (slip op. 2 n.1), the Court reaffirmed the teaching of *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and its applicability "in attempting to accommodate religious beliefs in the area of taxation" (slip op. 6).[2] Thus, contrary to respondent's contentions (Br. 32-34), the district court here correctly recognized that "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish

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[1]Two other examples (Appellee Br. 7 para. c, 8 para. f) involve situations in which the issue is whether the employee's discharge is due to misconduct or to incompetence; that issue would not seem to require any peculiarly religious determination. Instead, it requires an evaluation of the employee's abilities and his attitude toward his employer i.e., whether his default was intentional or not, rather than whether he committed a default.

Appellees' concern that the state may be required to determine whether a religious body is a church (*id.* at 8 para. j) is apparently not shared by this Court or the other courts that have faced similar problems under the Internal Revenue Code. See, *e.g.*, *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 784 n.15 (1981) and cases there cited.

[2]In this case, as in *Lee* (slip op. 4), it is appropriate to accept the employer's assertion that "both payment and receipt of * * * benefits is forbidden by the [religious] faith" of the employer and his employees.

an overriding governmental interest" (*United States* v. *Lee*, *supra*, slip op. 5), and struck the balance in favor of the important goals served by the unemployment tax system (compare J.S. App. 64a-65a with *United States* v. *Lee*, *supra*, slip op. 7). As this Court explained in *United States* v. *Lee*, *supra*, (slip op. 8; footnote omitted):

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security [and unemployment] taxes to an employer operates to impose the employer's religious faith on the employees. * * * The tax imposed on employers to support the [benefit] system must be uniformly applicable to all, except as Congress provides explicitly otherwise.

Appellees cannot avoid the force of this conclusion, or its applicability to their identical claim to an exemption from unemployment taxes, by characterizing their commercial activity—the conducting of a non-church-affiliated school—as the exercise of religion.[3] Cf. *De La Salle Institute* v. *United States*, 195 F. Supp. 891, 903-904 (N.D. Cal. 1961), (rejecting claim that First Amendment requires court to accept religious organization's definition of church function as controlling for tax purposes); accord, *Riker* v. *Commissioner*, 244 F. 2d 220 (9th Cir.), cert. denied, 355 U.S. 839 (1957).

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[3]Nothing in the Court's rationale in *United States* v. *Lee*, *supra*, suggests that the result there would have been different if the employer's activity had been educational, rather than agricultural and carpentering.

3. Appellee Grace Brethren Church (Br. 38) and Amicus American Jewish Congress (Br. 13-14) suggest that because the instant statutes implicate First Amendment rights, they should be subjected to strict judicial scrutiny. But in contrast to the statutes involved in the cases upon which appellee relies,[4] the unemployment tax statutes *protect* as well as burden First Amendment rights, since they protect the right of employees of religiously oriented schools not to be deprived of unemployment benefits on the basis of their religious affiliation. If Acts such as this, with a comprehensively neutral effect on First Amendment interests, were subject to strict judicial scrutiny, the practical result would be that Congress would be largely unable to legislate in this area at all. Such a result would not substantially further First Amendment interests, and would seriously limit the legislative power.

4. Amicus American Jewish Congress disputes the validity of the rationales we suggest for a statutory distinction between church affiliated schools and those with a religious orientation that are not affiliated with any specific church. Although amicus is correct in asserting that the validity of these distinctions has not been established, they are nevertheless sufficient to support the classification against the equal protection challenge. Congress is free to rely on reasonable, although unproven, distinctions. The fact that the distinctions are debatable does not mean they are arbitrary.[5]

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[4] *San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1 (1973); *Carey* v. *Brown*, 447 U.S. 455 (1980).

[5] Finally, we note that appellant California suggests (Br. 35) that the Tax Injunction Act is inapplicable because the federal government is an indispensible party to the suit, and could not be compelled to litigate the tax issue in the state courts. The error of appellant's premise is demonstrated by the fact that the federal government was not a party in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*, but the case was not fatally defective for that reason.

For the foregoing reasons and the additional reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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Nos. 81-31, 81-228 and 81-455

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IN THE

Supreme Court of the United States

October Term, 1981

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GRACE BRETHREN CHURCH, *et al.*,
Cross-Appellants,

v.

UNITED STATES, *et al.*,
Cross-Appellees.

On Appeals from the United States District Court for the Central District of California

BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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INTEREST OF THE AMICUS

This brief amicus curiae is submitted with the consent of the parties by the American Jewish Congress, a membership organization of American Jews founded in 1918 which seeks to protect the religious, political and economic rights of Jews and to promote the principles of democracy. The AJCongress is committed to the great unitary freedoms secured by the Establishment and Free Exercise Clauses of the Constitution. Because this case presents an important application of those guarantees, the American Jewish Congress is filing this brief.

STATEMENT OF THE CASE

A number of California churches, church-operated schools and independent religious schools brought suit to challenge the coverage of their school employees under the federal-state unemployment compensation scheme. They claimed that the employees of the private schools which they operated were excluded from the system under the terms of the Federal Unemployment Tax Act, 26 U.S.C. § 3309(b)(1) and parallel state law.* Section 3309(b) provides, in pertinent part:

> This section shall not apply to service performed —
>
> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or

* Cal. Unemp. Ins. Code § 634.5(a) (West Supp. 1981).

> principally supported by a church or convention or association of churches...

Alternatively, they claimed that, if their school employees were covered, that coverage violated the Establishment and Free Exercise Clauses of the First Amendment and the Constitution's Equal Protection guarantees.

The district court, after determining that it had jurisdiction of the case, ruled that schools that were either part of the corporate structure of a church (Category I schools) or directly affiliated with a church (Category II schools) were excluded from coverage under

26 U.S.C. § 3309(b)(1). The court further held that religious schools which were not controlled by a church or by a convention or association of churches (Category III schools) were not excluded from coverage under the terms of the statute and that their coverage did not violate the Free Exercise rights of the schools, their teachers, or the parents of children attending the schools. The district court rejected the plaintiffs' claim that the required record keeping and state supervision of that record keeping would amount to excessive entanglement. The court, however, ruled that the process of determining entitlement to unemployment compensation benefits for discharged employees of those schools would give rise

to excessive entanglement. Accordingly, it held that coverage of those schools' employees was barred by the Constitution.

Having so concluded, the district court found it unnecessary to rule on the Category III schools' claim that the extension of unemployment compensation tax coverage to them arbitrarily discriminated against religious schools without church affiliation and in favor of religious schools controlled and operated, directly or indirectly, by institutionalized religious sects or denominations, in violation of the Equal Protection Clause. Noting that the evidence demonstrated a "basic similarity" between the independent fundamentalist schools and the church-controlled schools in the case, and

stating that those schools are "virtually indistinguishable" in religious mission, the court concluded:

> By classifying schools according to formal church affiliation, rather than religious mission and curriculum content, and by subjecting non-church-affiliated schools to a financial burden from which church-affiliated schools are exempt, Congress and the California legislature have accorded different treatment to religious organizations which may well have equal status under the First Amendment.

These appeals followed. The federal parties argue on appeal, as they did below, that the district court erred in determining that it had jurisdiction of the case. Nevertheless, they urge this Court to reach the merits. Further, the

federal (and state) parties do not contest the district court's ruling as to the non-coverage of Category I schools, recognizing that the correctness of that ruling was established by this Court's recent decision in St. Martin Evangelical Lutheran Church v. South Dakota, 101 S. Ct. 2142 (1981). Nor do they appeal the ruling holding Category II schools exempt. They, and the state parties, do argue, however, that the court below erred in concluding that the statute's coverage of Category III schools would result in excessive church-state entanglement in violation of the Establishment Clause.

The Category III schools, in their cross-appeal, argue that the court below erred in rejecting their Free Exercise

claims and their claim that, both the eligibility determination process and the administrative relationship between religious schools and the state created by the statutory scheme results in unconstitutional entanglement with religion. They continue to assert their equal protection claim as well.

ARGUMENT

DISPARATE TREATMENT OF CHURCH-AFFILIATED RELIGIOUS SCHOOLS AND RELIGIOUS SCHOOLS OPERATED WITHOUT CHURCH AFFILIATION VIOLATES THE RELIGION CLAUSES OF THE FIRST AMENDMENT

The court below ruled in essence that religious schools that are part of the corporate structure of a church (Category I schools) and religious schools that are directly affiliated with a church

(Category II schools) are exempted, by statute, from the unemployment tax scheme. Those rulings are not challenged here. The court further held that religious schools that are not affiliated with a church (Category III schools) are within the statute's coverage, but that, because of excessive entanglement, that coverage is unconstitutional. That holding is challenged by the federal and state parties.

The amicus takes no position on the question whether the entanglement which coverage gives rise to violates the Establishment Clause. The amicus does urge, however, that inclusion of Category III schools is unconstitutional, without regard to issues of excessive

entanglement, because disparate treatment of religious schools solely based on their affiliation or lack of affiliation with a "church" violates the religion clauses of the First Amendment. This disparate treatment issue, not resolved by the court below, was characterized by that court as a question of equal protection. The amicus believes that both the equal protection guarantees and the religion clauses of the Constitution are implicated, but that the issue is best resolved by reference to the religion clauses.

Undoubtedly, not all regulation of the activities of religious institutions, or of religious schools, is proscribed by

the religion clauses of the First Amendment.

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church ... [O]ur State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception.

Roemer v. Board of Public Works, 426 U.S. 736, 745 (1976).

At the same time, the Free Exercise and Establishment Clauses do operate to place limits on the scope and nature of state regulation of religious activities. Under those clauses, "a hermetic separation" of church and state may not be required, id. at 746, but "scrupulous neutrality by the State as among

religions" is, id. at 745.

Just as reasonable time, place, and manner restrictions which serve significant governmental interests and which apply in an "even-handed," non-discriminatory fashion "to all alike" may not offend the free speech guarantees of the First Amendment, see Heffron v. International Society for Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981), even-handed, non-discriminatory regulation of certain operational aspects of religious schools may, under some circumstances, exist without offense to the religion clauses. Conversely, statutory obligations affecting the

activities of religious schools which are not evenhanded, which do not apply to all alike, and which are discriminatory either on their face or as applied are forbidden.

This neutrality principle lies at the very core of the First Amendment's religious guarantees. "[R]eligious gerrymanders," a clear violation of the neutrality rule, cannot be tolerated. Walz v. Tax Commission, 397 U.S. 664, 696 (1970) (opinion of Harlan, J.); Gillette v. United States, 401 U.S. 437 (1971). Quite simply, "[i]f the purpose or effect of a law ... is to discriminate invidiously between religions, that law is constitutionally invalid ...." Braunfeld v. Brown, 366 U.S. 599, 607 (1961). The

unemployment compensation law, as construed, does just that.

The federal government concedes, as it surely must, that the statute, as construed, results in the disparate treatment of Category III schools and church-affiliated schools. Addressing the issue as if it were merely one of equal protection, it argues that that disparate treatment is constitutional because there is a rational basis for the statutory classification.

The amicus contends that the rational bases urged by the government in support of the classification are insufficient to save the statute. They are not rational and, in any event, where sensitive First Amendment rights are

concerned mere rationality is not enough. More importantly, the distinctions proposed by the government are truly distinctions without a difference.

Separately incorporated Christian schools, like those of plaintiffs here, are no less religious in their beliefs, teachings, practices, or operations, and are no less an integral part of the religious mission of the Christian faith, than their church-affiliated counterparts. See Comment, Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues, 25 Villanova L. Rev. 69, 94 & n.201 (1979-80). By imposing unemployment compensation obligations on the first category of schools and not on

the second, the government has discriminated impermissibly against the former. Christian School Ass'n v. Comm., 55 Commw. Ct. 555, 423 A.2d 1340 (Pa. 1980).

The government claims that the legislative classification is rational and has hypothesized several grounds which purportedly justify it:

> First, church-run schools are more likely to have a strong and specific religious orientation than interdenominational schools or those established and run by laity. Second, the risk of church-political entanglement is greater when church-controlled schools are involved. See Lemon v.

> Kurtzman, supra, 403 U.S. at 622-623; Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 794-798 (1973). Third, there is a greater likelihood that employees of church-controlled schools will be provided with non-governmental assistance, through church relief programs, for economic hardships caused by unemployment. Finally, the distinction is practical to administer. It is relatively easy to determine whether a particular school is church-controlled, but may be very difficult to determine whether it is sufficiently "religious" to qualify for exemption as a Category III school.

None of these distinctions is valid.

First, there is no factual support for the government's claim that church-run schools are more likely to have a strong religious mission than non-church affiliated religious schools. Indeed, the findings of the court below are to the

contrary; the district judge found as a fact that the schools are "virtually indistinguishable" in religious mission. Accord, Christian School Ass'n v. Comm., supra, 55 Commw. Ct. at ____, 423 A.2d at 1346-47.

As to the government's second contention -- that the risk of church-political entanglement is greater when church-controlled schools are involved — the proposition is true only so long as the word "church" in the phrase "church-political entanglement" is read narrowly to mean denomination or sect. When "church" is read broadly to mean an institution which carries out religious functions, as it must, see, e.g., Young

Life Campaign v. Director, 122 Cal. App. 3d 559, 176 Cal. Rptr. 23 (3d Dist. 1981) the government's claim is nonsensical.*

The government's third ground for distinguishing between Category III and church-affiliated schools is equally flawed. The assertion that there is a greater chance that employees of the latter will be provided with

* The government may be suggesting that the risk of political divisiveness along religious lines is most acute when church-controlled groups are involved; its citations to Lemon and Nyquist support this reading. To the extent that the government is asserting that non-affiliated religious schools have less political clout or a smaller constituency than the affiliated schools, the ground is

non-governmental assistance, "through church relief programs," for economic hardship incident to unemployment appears to be sheer ipse dixit. Amicus knows of no data, and the government cites none, which tend to support that statement.

(con't)
patently invalid as a justification for upholding the legislative classification. Discrimination against the politically powerless is less tolerable because it is not likely to be corrected by the democratic process, though it is surely more likely than discrimination against the powerful. Moreover, given the recent growth of Christian schools — both church-affiliated and independent - the government may be seriously underestimating the political strength of, and popular loyalty towards, the non-affiliated schools.

Finally, the government's claim that the statutory distinction is "practical to administer" because it is easier to determine whether a particular school is church-controlled than whether it is sufficiently religious to qualify for exemption surely cannot save the legislative classification. First, of course, in order to qualify for exemption under Section 3309(b)(1)(B) a school must demonstrate not only that it is operated, supervised, controlled or principally

supported by a church or ... association of churches", but also that it is "operated primarily for religious purposes." Thus, whether a particular school is operated primarily for religious purposes — the "more difficult" question -- must be determined anyway in ascertaining entitlement to exemption of Category II schools. That inquiry is no different with respect to Category II and Category III schools.

In any event, we believe the government is wrong in characterizing the question of control as an easy one. In some cases, it may be relatively simple to ascertain whether a school is affiliated with a church or whether it is not. See, e.g., Employment Division v. Northwest

Christian College, 31 Or. App. 201, 570 P.2d 100 (1977); Employment Division v. Archdiocese of Portland, 42 Or. App. 421, 600 P.2d 926 (1979). But the easy cases are limited to those where "church" is defined narrowly and in terms of traditional preconceptions about religion. This Court has recently written that "[t]he determination of what is a religious belief or practice is more often than not a difficult and delicate task." Thomas v. Review Board of the Indiana Employment Security Division, 101 S. Ct. 1425, 1430 (1981). The determination of what is a "church" is an equally sensitive

task. See generally, Young Life Campaign v. Director of Employment, supra. (Christian youth organization with no official connection with any denominational church body, which declined to hold itself out as a church because those whom it sought to reach reacted negatively to traditional churches, which used clergy ordained by traditional churches, and which encouraged affiliation with traditional churches was nonetheless a church within the meaning of Cal. Unemp. Ins. Code §634.5). See also Whelan,

Church in the Internal Revenue Code: The Definitional Problems, 45 Fordham L. Rev. 885 (1977) [hereinafter Definitional Problems].*

* Indeed, the First Amendment may well require that non-affiliated sectarian schools themselves be regarded as "churches."

> It could be argued that ... parents who own, control, and principally support a church constitute a church. While the parents involved in Christian schools may not all be members of the same local congregation of worshippers, they tend to share common religious goals and ideals, meet regularly, and engage corporately in worship and other religious activities.

Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws, supra, at 94, n.198.

Even where traditional churches are involved, given the variety of ways in which church-affiliated religious schools are organized and operated, a function of the myriad ways in which different churches, synagogues and congregations are themselves organized, the question of "control" is not necessarily an easy one. Indeed, where religious organizations are concerned, true "control" may be more a matter of moral suasion and tradition, than a function of corporate, legal controls or financial strings. Cf. NLRB v. Bishop Ford Central High School, 623 F.2d 818, 824 (2d Cir. 1980), cert. denied, 101 S. Ct. 1698 (1981) (separately incorporated Roman Catholic high school not subject to jurisdiction of NLRB; "The position of the Board that Ford Central is

a legal entity 'separate and distinct from the Church' is ... irrelevant and in any event not accurate. Ford Central is only conditionally separated from the diocese and the condition imposed is continuing allegiance and loyalty to the Church"); Employment Div. v. Northwest Christian College, supra (theology school with independent board under control of Church); Ritter v. Mt. St. Mary's College, 495 F.Supp. 724 (D.Md. 1980) (independent Catholic college).

But even if the government's contentions were logical and factually supportable, the fact remains that, precisely because there is a "great diversity in church structure and

organization among religious groups in this country," St. Martin Evangelical Lutheran Church v. South Dakota, supra, 101 S. Ct. at 2142, n.12, the statutory classification necessarily operates capriciously and discriminatorily on the basis of the beliefs and resulting organizational structures of the various religions.

> ... American churches have diverse, complex and confused structures. They are more like molecules than atoms. Moreover, each church has a double structure: one internal, in its own ecclesiastical law, and the other external, in American civil law.
>
> In their own ecclesiastical law, some of the American churches are congregational in structure; others are hierarchical ...

In the congregational churches, the faith and internal religious law of the denominations make each local congregation autonomous. The coordination of the various congregations' activities is a matter of voluntary agreement or "covenant." Each local congregation is usually a separate civil law corporation or trust. The local congregations establish still other civil law corporations or trusts to carry on the activities, such as the maintenance of a seminary or the propagation of the faith at home or abroad, that they have agreed to carry on in common ....

In the hierarchical churches ... the faith and internal religious law create a single church authority with jurisdiction over all the members and branches of the church. Local congregations are divisions, not autonomous units ...

Regardless of their congregational and hierarchical structure, all of the American churches employ a multitude of civil law corporations and trusts to carry on their functions of worship, preaching, educating, healing and otherwise caring for the spiritual and corporal needs of their own members and of the general public. The

> churches have created uncounted thousands of civil law corporations and trusts for a variety of legal, historical and ecclesiastical reasons.

Definitional Problems, supra, at 903-4.

Given the structure of the Catholic Church, most Catholic parochial schools will undoubtedly be exempt from the unemployment compensation scheme as it stands. But cf. NLRB v. Bishop Ford Central Catholic High School, supra. The same may be true for the Lutheran schools of this nation. See L. Pfeffer & A. Stokes, Church & State in the U. S. 419 (1964); St. Martin Evangelical Lutheran Church v. South Dakota, supra.

In contrast, most, but not all, Jewish schools would be subject to the unemployment laws, for the typical Jewish day school is conducted under non-congregational auspices.

> In 1962, 86.3 percent of [such] schools outside New York were non-congregational; 11.7 percent were congregational; and 20 percent were inter-congregational. In Greater New York about 85 percent of the schools are non-congregational.

A. I. Schiff, The Jewish Day School in America 100 (1966).

At least where the Jewish schools are concerned, coverage or non-coverage will be particularly capricious since, whether an individual religious school is affiliated with a particular synagogue or congregation or group of synagogues or congregations, or whether it exists without any such affiliation is largely a matter of historical accident. An individual school's corporate identity and formal relationship with a synagogue or

association of synagogues is a function of such factors as the personality and affiliation of its founders, financial or funding considerations, and space availability. It has little or nothing to do with the religious nature or function of the schools. See generally, A. Schiff, supra, passim (describing founding and development of particular Jewish day schools). Indeed, it is not unusual for individual orthodox Jewish schools to have spun off their own congregations (i.e., synagogues). Under these circumstances, the distinction between affiliated and non-affiliated schools is truly meaningless.

Religious groups "maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body would deny this is an affirmative if not dominant policy of church schools." Walz v. Tax Commission, 397 U.S. 664, 671 (1970). That being the case, the distinction between churches and church-related schools is ultimately an unworkable and a non-productive one. "A church is more than merely an edifice affording people the opportunity to worship God." Matter of Community Synagogue v. Bates, 1 N.Y. 2d 445, 453, 154 N.Y.S. 2d 15,21,136 N.E. 2d 488, 493 (1956). Rather, it is a community of persons carrying out a

perceived religious mission through a variety of ministries, often including educational ones.

Likewise, the distinction between church-related religious schools and non-affiliated religious schools is an untenable one. Both are, in fact, constitutionally indistinguishable from "churches" — both are indeed "churches" — so both must be treated alike. Disparate treatment is necessarily irrational, arbitrary and capricious. Because the statute's classifications result in different treatment of religious organizations which have "equal status" under the Firt Amendment, the statute is constitutionally infirm.

CONCLUSION

For the reasons stated, this Court should hold that neither the federal nor state governments may distinguish, for purpose of unemployment insurance coverage, between those religious schools which are church affiliated and those which are not.

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Nos. 81-31, 81-228 and 81-455

IN THE

Supreme Court of the United States

October Term, 1981

CALIFORNIA, et al., Appellants in No. 81-31
v.
GRACE BRETHREN CHURCH, et al.

UNITED STATES, et al., Appellants in No. 81-228
v.
GRACE BRETHREN CHURCH, et al.

GRACE BRETHREN CHURCH, et al., Cross-Appellants in No. 81-455
v.
UNITED STATES, et al.

On Appeals From the United States District Court for the Central District of California

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF OF GRACE BRETHREN CHURCH, ET AL.

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Nos. 81-31, 81-228, 81-455

IN THE

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GRACE BRETHREN CHURCH, ET AL.

Cross-Appellants

v.

UNITED STATES, ET AL.,

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION OF GRACE BRETHREN CHURCH, ET AL., TO FILE POST-ARGUMENT BRIEF

Pursuant to Rule 35.6 of the Rules of this Court, Grace Brethren Church, *et al.*, move for leave to file the attached brief. In support of this motion movants state as follows:

1. On Thursday, March 25, 1982, five days before the scheduled date of oral argument, movants received by ordinary mail Reply Brief of Appellants, State of California, *et al.*, which raised new arguments in the case, including argument based upon the recent decision of this Court in *United States v. Lee*, — U. S. —, 50 U. S. L. W. 4201 (February 23, 1982). The interval between Thursday and the following Tuesday for which oral argument was set provided movants with no adequate opportunity to respond to the aforesaid Reply Brief. Movants nonetheless believe it essential to proper disposition of this litigation that they be afforded an opportunity to address certain matters raised in the Reply Brief.

2. Upon oral argument, it became evident that inadequate information had been furnished the Court in the briefs of all the parties (including movants) on a dispositive aspect of the threshold issue of district court jurisdiction under 26 U. S. C. § 1341, the Tax Injunction Act. To assure that the Court will not arrive at a decision (and a resulting precedent) without the needed information in hand, it is essential that that information be summarily presented in a post-argument brief.

Wherefore, movants respectfully request that their motion for leave to file the attached post-argument brief be granted.

Respectfully submitted,

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POST-ARGUMENT BRIEF OF GRACE BRETHREN CHURCH, ET AL.

ARGUMENT

I. District Court Jurisdiction and the Tax Injunction Act: No Remedy *Whatever* Is Available (A) Because Declaratory Judgment Is Barred by State Law, (B) Because of Forbidden Administrative Entanglements Arising *Prior to* Appeal Into State Court.

1. *No Declaratory Judgment Allowed By State Law.* California law absolutely barred the movants from seeking declaratory judgment. California Unemployment Insurance Code, § 1851; Constitution of California, Article XIII, Section 32. And see *Pacific Gas & Electric Co. v. State Board of Equalization*, 27 Cal. 3rd 277, 165 Cal. Rptr. 122, 124 (1980). All that has been spelled out for the Court in the letter of movants' counsel to Francis Lorson, Esq., Chief Deputy Clerk dated March 31, 1982, and distributed to the Court April 1, 1982.

2. *No Possibility of State Court Relief Prior to Excessive Entanglement.* Here is what has not been clearly disclosed in any brief: *that entanglements of a plainly excessive sort are likely to occur in the benefit eligibility determination process and that that process can ensue from the inception of employment.*[1]

That crucial point is merely implied in movants' brief. But 58 pages of the Joint Appendix constitutes a graphic portrayal, by government expert witnesses, of state involvement in religious judgments and actions by comparison to which the government involvements warned against in *Lemon*,[2] *Serbian Orthodox*,[3] *Jones*[4] and *Catholic*

1. A new employee may seek benefits immediately, even if he or she had accrued the requisite qualifying number of quarters of employment under a previous employer.

2. *Lemon v. Kurtzman*, 403 U. S. 602 (1971).

3. *Serbian Orthodox Diocese v. Milivojevich*, 426 U. S. 696 (1976).

4. *Jones v. Wolf*, 443 U. S. 595 (1979).

Bishop of Chicago [5] are relatively innocuous. The benefit determination process *necessitates* state determinations of doctrine, reasonableness of doctrine, importance of doctrine, breach of doctrine and quality of religious zeal. The religious school has to face those possible entanglements [6] even though going up a ladder of administrative appeals in which the school is foreclosed from contending that the Act may not be constitutionally applied to it at all. (See California Constitution, Article III, Section 3.5).

Movants' main brief of course also shows that, apart from the benefit determination process, pervasive and enveloping administrative entanglements—which also chill Free Exercise rights—accompany the imposition of the statutory scheme throughout. How can this be described other than to constitute "sustained and detailed administrative relationships for enforcement of statutory or administrative standards" held forbidden in *Lemon*? Or the "confrontations and conflicts that follow in the train of those legal processes" [tax valuations, liens and foreclosures] criticized in *Walz*? [7] It can scarcely be said that this Court can now change its teaching on entanglement merely because no program of subsidy to religious schools is involved. First, the entanglement condemned

5. *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490 (1979).

6. Let it not be said that because those entanglements may, in part, be potential, they do not result in unconstitutionality. First, this court has held that the *potential* for entanglement is itself constitutionally offensive, *Lemon* having been decided on a motion to dismiss, with no record of actual entanglements having been produced. Second, however, instances of entanglement in the benefit determination process have *already* occurred to the very schools involved in this appeal. See the instance involving Redwood Christian Schools and the Oakland Office of Appeals over "regular" attendance at church. Brief for Grace Brethren Church, *et al.*, 16, fn. 8.

7. *Walz v. Tax Commission*, 397 U. S. 664, 674 (1970).

in *Lemon* was not bad because it was aid; the aid was bad because it was entangling. Second, that conclusion was clearly the heart of the Court's warning on entanglement in *Catholic Bishop of Chicago*, a case involving, not subsidy, but imposition of a federal regulatory scheme which had as yet involved *no* entanglement comparable to the above which arises in the benefit eligibility determination process.

Nor may an action for refund of taxes paid be entertained, prior to exhaustion of the administrative process, by the California courts. The California legislature has foreclosed any such action in § 1241 of the Unemployment Insurance Code. Thus, the bar of the first sentence of Article XIII, Section 32 of the Constitution of California is absolute as to the State's unemployment tax program, and not even the second sentence of that section—permitting the legislature to authorize refund actions in court—has been given effect with respect to unemployment taxes.

It is no answer to say, as do California and the United States, that constitutional harm can be avoided by religious schools which elect to participate in the unemployment tax program on the "reimbursement method", *i.e.*, paying into the fund only when a claim has been paid to one of its former employees. (1) Merely to elect participation is to acknowledge the licitness of the program. (2) The essence of the reimbursement method is the benefit eligibility determination process, already seen to be fraught with inquiries into faith and doctrine. (3) The State cannot even guarantee that unwarranted claims can be challenged in all instances, since Section 803(c) of the Unemployment Insurance Code denies reimbursement method employers the right to obtain relief from charges for benefits wrongfully paid, even in "misconduct" and "good cause" voluntary quit situations. See Unemployment Insurance Code Section 1030.

II. District Court Jurisdiction Did Not Depend Upon Whether the Religious Parties Would, of a Certainty, Ultimately Prevail on the Merits.

It was the judgment of the district court, closely familiar with local California law, and, having heard the government's expert testimony at first hand, that imposition of the challenged program on religious schools would give rise to forbidden excessive entanglements in the administrative proceedings *prior* to any opportunity for state court review. If the district court's judgment on the First Amendment merits was erroneous, this did not mean that the court had no jurisdiction. The propriety of assumption of jurisdiction by the district court should not depend upon whether, in the end, a violation of the Religion Clauses would be surely established but whether, at the beginning, a reasoned judgment, at trial court eye level, was made (a) that substantial Religion Clause issues existed, (b) that no state court declaratory judgment or injunction could yet be granted, (c) that the administration of the Act produced sustained and detailed administrative relationships between government and ministry, (d) that live potential was present from the start for the worst sorts of entanglement (involving state agents' judgments on doctrine, moral conduct and religious fervor), and (e) that, in state administrative proceedings, state agencies were forbidden, by California law, to pass upon constitutional issues.[8]

Certainly, too, the language chosen by the Congress in the Tax Injunction Act—"plain, speedy, and efficient remedy"—must not be stripped of all meaning. Judge Mariana Pfaelzer, relying on this Court's language in

8. "An administrative agency . . . has no power . . . (b) to declare a statute unconstitutional." Constitution of California, Article III, Section 3.5.

Tully v. Griffin, Inc., 429 U. S. 68, 76 (1976) (reiterated in *Rosewell v. LaSalle National Bank*, 450 U. S. 503, 517 (1981)), held state court relief here "at best uncertain". (J. S. App. 17a). But on the record it is plain that no remedy whatever existed. The odiousness of an eligibility determination process in the case of discharge of a teacher who had departed the faith or morals of the school would be but compounded through recycling in administrative appeal—while, upon appeal at last into state court, all that could be reviewed would be the result. The constitutional damage to the ministry would *already* have been suffered.

A similar situation was presented to this Court in *Barry v. Barchi*, 443 U. S. 55 (1979), wherein a statutorily-prescribed administrative procedure was challenged as unconstitutional. This Court refused to force the litigant (who was asserting a mere property right) to pursue the challenged procedure to its exhaustion prior to commencing an action in federal court. The Court stated:

> "Under existing authority, exhaustion of administrative remedies is not required when 'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit'." *Barry, id.* at 63, n. 10 citing *Gibson v. Berryhill*, 411 U. S. 564, 575 (1973).

This holding was joined by the entire Court (see separate opinion of Brennan, J., 443 U. S. at 68-69), and precisely describes the situation of Redwood Christian Schools herein. If forced to pursue the administrative process which it challenges as unconstitutional, this pervasively religious entity will have, *ipso facto*, suffered the harm to its religious liberties it had sought to prevent by bringing its complaint in federal court.

III. *United States v. Lee* Is Not in Point.

The governmental parties contend, in their Reply Briefs that *United States v. Lee*, — U. S. —, 50 U. S. L. W. 4201 (February 23, 1982) is here controlling. The attempt to lump together the two cases by the device of calling the school ministries "commercial" is contrary to the record (J. App. 94-98) and to fairness. If running a Christian school, through self-sacrifice and dedication and at no profit is "commercial", so is the activity of every nonprofit organization. *Lee* is distinguishable on at least two grounds: (a) the activity sought to be taxed, (b) the differences in governmental interest.

Sought to be taxed here is a prime religious activity, the religious formation of children—a ministry, an apostolate. Sought to be taxed in *Lee* was Mr. Lee's activity in hiring half a dozen men, to make himself a profit through the manufacture of unfinished lumber to be sold for commercial housing.

No such compelling state interest exists for the imposition of the Act upon the Redwood and San Diego Christian Schools as the Court found to exist for the imposition reviewed in *Lee*. The unemployment tax statute already contains so broad an exemption for religious ministries, that recognizing (on constitutional grounds) the non-church schools as excluded, would be without consequence to the national program. Secondly, all schools—the very schools here involved—were exempt until 1978. The govenmental parties have made no showing whatever that something occurred in 1978 giving rise to a suddenly *supreme* governmental interest in covering religious schools. The present case is plainly within the principle of *Sherbert v. Verner*, 374 U. S. 398 (1963).

IV. It Would Be Unconscionable to Force the Christian Schools Back to California Administrative and Court Proceedings for Eventual Review of the Merits of a Case Whose Merits Are Right Now Fully Before This Court for Disposition.

The religious plaintiffs in this case sued the United States with respect to a federally controlled program, challenging the imposition of that program on substantial, non-frivolous federal constitutional grounds. They were therefore properly in federal court unless the Tax Injunction Act barred district court jurisdiction.

The State of California, in response to the complaint filed by Grace Brethren Church, filed a cross-claim against the federal defendants, seeking declaratory relief against a federal requirement that the State impose unemployment tax coverage upon the religious schools. (J. A. 31). If California could not obtain such relief, it would suffer decertification of its entire state program, a heavy penalty indeed. There can be no doubt that the California cross-claim is in no way affected by the Tax Injunction Act, and therefore, the district court's jurisdiction to declare the federal requirement invalid could amply rest upon this cross-claim.

The various interpretations of the 1976 FUTA amendments made by the United States Secretary of Labor have occasioned a four-year nationwide spate of litigation for religious schools whose only desire is to be left alone by government, so that they may pursue their innocent and worthwhile task of providing religious education to youngsters. The constitutional case has now been litigated in its every aspect. But this has been at great expense to the small religious ministries here involved. Should they now be remitted to proceedings in California, they would face further *years* of proceedings there, commencing with administrative proceedings in which it would be futile to

raise any constitutional issue. When at last in state court, they would then be put to the repetition of the entire factual case which they have already once and well presented in a federal court. If it is true, *arguendo*, that the religious liberty for which they have contended is all of a piece with, and no more significant than, the property rights [9] of the operator of the commercial apartment building seen in *Rosewell*, nevertheless that conclusion, *which is a conclusion on the merits*, should not be used to force the religious schools to wait until perhaps 1984 or 1985 (if their resources can sustain the wait and their liberties the ensuing constitutional damage) for relief they had sought in a federal court in January, 1979. Such a bizarre enforced detour on the path to their liberties is precisely the kind of thing which is causing popular dismay toward the American legal system.

These religious schools have been set upon by the federal and state governments as a result of their obedience to religious principle, and for their reliance on constitutional guarantees of religious freedom and church-state separation. They do not seek to broaden federal court jurisdiction beyond its proper limits, nor do they seek to establish an exception to a salutary principle of federal judicial restraint. They have merely brought a federal constitutional case into a federal court where federal jurisdictional statutes expressly invite such actions, and where the Tax Injunction Act expressly permits the adjudication of such matters in the absence, as here, of a plain, speedy and

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9. Upon oral argument, counsel for Grace Brethren Church made the point that fundamental constitutional liberties have been accorded a greater degree of protection from government encroachment than mere property rights. See, *e.g.*, *U. S. v. Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938); *Murdock v. Pennsylvania*, 319 U. S. 105, 115 (1943); *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 639 (1943).

efficient remedy in the California courts. The schools do not even ask for an expansive construction of the existing exception to the Tax Injunction Act, for their California remedy is, in the oft-repeated phrase of this Court, "at best uncertain". But the schools' remedy for their claims as to the harms inherent in the administrative process is not merely "uncertain" under California law; it is non-existent.

Movants respectfully plead that this case now be decided on the merits. No principle of federalism would thereby be endangered. The most essential elements in the federal system—justice and due process—will *otherwise* be endangered.

Respectfully submitted,

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